NO. 76-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Petitioner,*

v.

F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, *Respondents,*

and

UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)—*Intervenors*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Southern Pacific Transportation Company requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The decision and order of the administrative law judge of the Occupational Safety and Health Review Commission is reported at 1971-1973 OSHD ¶15,395 and appears in the Appendix at pages 1a-23a. The opinion of the Commission is reported at 13 OSAHRC 258 and appears in the Appendix at pages 24a-51a. The opinion of the Fifth Circuit Court of Appeals, printed in the Appendix at pages 52a-64a, is reported in 539 F.2d 386. The judgment of the Court of Appeals appears in the Appendix at pages 65a-66a. The order of the Court of Appeals denying Southern Pacific's motion for rehearing appears in the Appendix at page 67a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1976 (App. p. 66a). A timely petition for rehearing was denied on January 10, 1977 (App. p. 67a). Mandate was stayed to and including April 11, 1977. The jurisdiction of this Court is invoked under 28 USC §1254(1) and §11(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §660(a).

QUESTIONS PRESENTED

1. Whether Congress enacted a prospective industry-wide exemption which removes petitioner's railroad maintenance and repair shop from application of the Occupational Safety and Health Act of 1970, under §4(b) (1) of that Act which exempts "working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health"?

2. Whether Congress in enacting §4(b) (1) of OSHA meant the language "working condition" for which there has been an "exercise (of) statutory authority" to exempt:

a. Only that precise *aspect* of the hazard which is *specifically* addressed by the agency; or

b. Only each individual "hazard" addressed by the "other federal agency"; or

c. The entire industry upon a showing that the agency has exercised its authority to regulate safety or health of that industry.

3. Has the exercise of statutory authority by the Federal ailroad Administration been sufficient to exempt petitioner's railroad maintenance and repair shop from application of OSHA under §4(b) (1) of that Act?

STATUTES INVOLVED

Section 4(b) (1) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 653(b) (1), reads as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 254 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Section 202(a) of the Federal Railroad Safety Act of 1970, 84 Stat. 971, 45 U.S.C. §431, reads in pertinent part as follows:

> portation") in this title referred to as the ("Secre-portion") in this title referred to as the ("Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on the date of enactment of this title, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety . . .

STATEMENT OF THE CASE

This is an action to review a final order of the Occupational Safety & Health Review Commission ("Commission") affirming a citation and notice of proposed penalty issued to Southern Pacific Transportation Company ("Southern Pacific") by the Secretary of Labor ("Labor") for alleged violation of certain standards prescribed under authority of the Occupational Safety and Health Act of 1970 ("OSHA").

This matter arose out of an inspection conducted by Labor of Southern Pacific's shop facility located in Houston, Texas. As a result of the inspection Labor cited Southern Pacific for failure to comply with certain crane safety standards,[1] for failure to display an informational poster[2] and for failure to maintain a log of occupational injuries and illnesses.[3]

Responding to Labor's Complaint, Southern Pacific stipulated the facts, but raised the jurisdictional issue of its exclusion from coverage by OSHA by reason of Sec-

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1. 29 C.F.R. §1910.179(b)(5) and 179(j)(2).
2. 29 C.F.R. §1903.2(a).
3. 29 C.F.R. § 1904.2(a).

tion 4(b) (1). Southern Pacific contended that the exercise of statutory authority by the Federal Railroad Administration ("FRA") had, under §4(b) (1), exempted the railroad, and Southern Pacific's Houston repair shop in particular, from application of the standards promulgated by Labor pursuant to OSHA.

Review Commission Judge John Castelli ruled that §4(b) (1) exempted Southern Pacific from OSHA regulations requiring the maintenance of a log of occupational illnesses and injuries since the Department of Transportation ("Transportation") already had regulations requiring Southern Pacific to file detailed, monthly reports of all accidents related to railroad operations.[4] However, the Judge construed §4(b) (1) as not affording an exemption for employees' working conditions in the railroad industry (App. p. 21a).

On review by the full Commission, the decision was affirmed by a two to one vote (App. p. 31a). The majority agreed with Labor's position that §4(b) (1) applies only to "specific working conditions" (App. p. 28a). The Commission majority held that an employer must follow the OSHA standard as to a given hazard unless FRA had issued a standard of its own addressed to every aspect of the same precise hazard. The Commission chairman strongly dissented, believing that the language and legislative history of the Act dictated a decision that FRA's regulatory activities had been sufficient to trigger a §4(b) (1) exemption for the entire railroad industry (App. p. 40a-51a).

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4. These regulations were promulgated pursuant to the Accident Reports Act of 1910, 45 U.S.C. §§38-43.

On Appeal brought under §11(a) of OSHA, 29 U.S.C. §660(a), the Court below affirmed.[5] The Court purported to avoid the "extreme position" of Labor and the Commission that the exemption was effective only as to individual aspects of hazards. It ruled that "§4(b) (1) means that any FRA exercise directed at a working condition — defined either in terms of a 'surrounding' or a 'hazard' — displaces OSHA coverage of that working condition." The Court's opinion indicates that unless FRA treatment of a general problem area is "comprehensive," an individual hazard approach to the exemption will be followed (App. p. 60a). It found, however, that under its interpretation of §4(b) (1) there was no exemption for the alleged violations by Southern Pacific.

REASONS FOR GRANTING THE WRIT

I

Three Circuit Courts of Appeal have now considered the application of §4(b) (1) to the railroad industry.[6] Other cases are now pending in the Seventh, Eighth and Ninth Circuits[7] dealing with §4(b) (1). In no case yet

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5. Consolidated for purposes of review by the Fifth Circuit in addition to petitioner's case were the following: Union Pacific Railroad Company v. Secretary of Labor, No. 75-1613; Seaboard Coastline Railroad v. Occupational Safety & Health Review Commission, No. 74-3984.

6. Southern Railway Co. v. Occupational Safety and Health Review Commission, 539 F.2d 335 (4th Cir. 1976), *cert. denied*, _____U.S._____ (Dec. 6, 1976) (No. 76-100); Baltimore & Ohio R. Co. v. Occupational Safety & Health Review Commission, and Seaboard Coast Line R.R. Co. v. Occupational Safety & Health Review Commission, Nos. 75-2163, 75-2244, _____F.2d_____ (D.C. Cir., decided Dec. 30, 1976).

7. To the best of petitioners' understanding, the cases appealed under OSHA include, perhaps among others, Chicago, M. St. P & P

decided has the circuit court applied the same standard as that of a sister circuit. The Fourth Circuit held that §4(b) (1) exemption applies to an employee's "environmental area" and is triggered whenever another agency "has exercised its statutory authority to prescribe standwards affecting occupational safety or health for such an area."[8] The Fourth Circuit defined "working conditions" to mean "the environmental area in which an employee customarily goes about his daily tasks." The Fifth Circuit, on the other hand, has approached this crucial definition from another direction, and held that "any FRA exercise directed at a working condition — defined either in terms of a "surrounding" or a "hazard" — displaces OSHA coverage of that working condition"[9] (App. p. 60a). Recognizing this conflicting approach the Fifth Circuit stated:

> Our conclusion that the operative effect of §4(b) (1) is determined by the manner in which the FRA articulates its exercise of authority seems to us more attuned to the differing possible meanings of the term "working conditions" as it is used elsewhere in the field of industrial relations. (App. p. 61a, n. 10) (539 F.2d at 391, n. 10).

Ry. v. Occupational Safety & Health Review Comm'n, 7th Cir., No. 75-2122; Burlington Northern v. Occupational Safety & Health Review Comm'n, 8th Cir., No. 75-1943; Penn Central v. Occupational Safety & Health Review Commission, 4th Cir., No. 75-1102; and *see* Dunlop v. Burlington Northern, Inc., 395 F. Supp. 203 (D. Mont. 1975), *appeal pending*, 9th Cir., No. 75-3184.

8. 539 F.2d at 339.

9. Both the Fourth and Fifth Circuit Courts sought to construe the term "working condition" by reference to Corning Glass Works v. Brennan, 417 U.S. 188 (1974), where the Court considered the use of the term in the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1).

In the D. C. Circuit decision, *Baltimore & O. R. R. Co. v. OSHRC*, the Court in a per curiam opinion avoided any discussion of the standard to be used in defining the term "working conditions."

These differing interpretations in the Fourth and Fifth Circuits, and the avoidance of discussion in the D. C. Circuit of the crucial term "working conditions" leave petitioner and the state of the law in confusion. The obvious question yet to be answered is "what is actually meant by the term 'working conditions' "? Without the definitive answer to this question there will be no uniform manner of determining when the §4(b) (1) exemption is triggered.[10]

The conflict in definitions is evident in that the Fifth Circuit used both of the elusive concepts, "surroundings" *and* "physical hazards" while the Fourth Circuit used the equally vague term "environmental area." Consequently, in the Fifth Circuit, although the FRA "exercised its authority" by promulgation of certain safety regulations for the railroad machine shop ("surroundings"), the fact that the FRA regulations did not specifically and precisely address one component risk ("hazards") in that machine shop such as an overhead crane, would mean that the §4(b) (1) exemption was not triggered and OSHA

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10. For instance, under the Fifth Circuit definition, the factors which comprise an employee's "surroundings" and "physical hazards" are overlapping and incapable of precise limitation. As an example of the questions raised, dust is both an element of an employee's surroundings and a physical hazard comparable to poisonous gases or explosive fumes. Would OSHA standards on dust levels be displaced by FRA regulations on the problem of fire protection or would such OSHA standards only be partially displaced to the extent dust concentrations create a fire hazard, but not to the extent that dust levels create a respiratory hazard?

standards would apply. At the same time, the term "environmental area" as used by the Fourth Circuit suggests that any FRA regulations concerning the machine shop would trigger the §4(b) (1) exemption for all aspects of the industry shop.

The same critical need to define the boundaries between comprehensive federal regulatory programs which was found by the Court in *Train v. Colorado Public Interest Research Group*, 421 U.S. 60 (1976), is present here.

II

The question involved in this case - the standard for use in determining when regulatory action by the FRA pre-empts the application of OSHA standards - is a question of vital national importance. The number of cases pending on this issue is increasing,[11] and with the conflicting tests of the Fourth and Fifth Circuits, and the lack of an identifiable standard in the D. C. Circuit, confusion and lack of uniformity will continue to increase until and unless a definitive standard is established by this Court.

As both the Fifth and D. C. Circuits admitted, the situation is "visibly pregnant with dangers of duplication and overlapping assertions of authority by competing federal agencies."[12] The number of employees and employers affected by the Fifth Circuit ruling alone is great. The varying standards being announced threaten the uniformity of the national programs envisioned by Congress.

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11. See footnote 7, *supra*.

12. D.C. Circuit opinion, Nos. 75-2163 and 75-2244.

The present situation is intolerable from the standpoint of administrative practicality, for the Fifth Circuit has encouraged the FRA and Labor to engage in a race to the Federal Register and there to engage in a battle of minutiae to achieve and maintain dominance over an "environmental area," "hazard," "surrounding" or "working condition."

The probability of agency friction is raised to a certainty by the presence of the Occupational Safety and Health Administration. With its well-deserved and established reputation for bureaucratic blindness and overkill,[13] Labor has already engaged in bureaucratic infighting with the Departments of Transportation ("Transportation"), Commerce and the Interior.[14]

The cross-fire of regulations means uncertainty and great and unnecessary expense for petitioner, the other

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13. For instance, OSHA standards specifically deal with toilet seats; see 29 C.F.R. §1910.141(c)(3)(ii). The standards for the configuration of toilet seats have twice been revised by Labor since issuance of its initial standards in 1971. Such continual revision and attention to trivialities has often been cited by Commissioner Moran of the Occupational Safety and Health Review Commission as evidence of Labor's irresponsibility; see Speech to American Trucking Counsel of Safety Supervisors, June, 1974, reported in BNA DAILY LAB. REP. (June 13, 1974) at pages A-6 - A-8. It has been estimated that compliance with this standard alone could cost small businesses $240,000,000. *Hearings on Oversight and Proposed Amendments of Occupational Safety and Health Act of 1970* (House Select Subcommitte on Labor, Committee on Education and Labor), 92nd Cong., 2d Sess. (Committee Print) p. 45 (1973).

14. In a letter to the Office of Management and Budget, these three cabinet-level agencies asserted that Labor was "interpreting its responsibilities too broadly in assuming oversight responsibilities over other agencies of the Executive Branch." National Safety Council, *OSHA Up to Date* (Feb. 1975). In addition, Transportation has in the past taken issue with Labor's interpretation of §4(b)(1) and "its assumption of broad responsibilities involving other federal agencies." *Id.*

railroads, and the taxpayer, all without a corresponding increase in safety and health for the worker. After compliance with one agency's regulations covering an "environmental area", the railroad must then decide whether it must comply with another agency's regulations pertaining to a "hazard". Already there is an overlap situation in railroad safety matters affecting the repair shop in question here.[15] The duplicated effort and expense caused the railroads by the lack of a definitive standard for preemption is a serious problem. As the Fourth Circuit recognized, "the Act was intended both to provide comprehensive coverage to the workers across the country and to avoid duplication of regulatory effort by the various Federal agencies."[16] The present judicial situation threatens to thwart that congressional purpose to avoid duplication, unless this Court steps in. In addition, the certain multiplicity of litigation, which process has already begun,[17] exploring the question of the point at which another agency's statutory authority is to be deemed exercised under §4(b)(1) is also reason for this Court to set a definitive standard.

Administrative and financial chaos will almost certainly flow from the absence of a definitive boundary for the agencies involved. America's railroads have a compelling

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15. On March 7, 1975, the FRA published its Advance Notice of Proposed Rule Making, 40 Fed. Reg. 10693, et seq., and on July 15, 1976, it published a Notice of Proposed Rulemaking, 41 Fed. Reg. 29153, which proposals call for the adoption of some OSHA regulations applicable to railroad safety matters, modification of some and the rejection of others in their entirety. These proposed standards directly affect cranes used in repair shops.

16. 539 F.2d at 339.

17. See footnote 7, *supra*.

need for a clear, administratively feasible standard for §4(b)(1) pre-emption which none of the Circuit Courts of Appeal have provided. The conflicting approaches taken have and will only exacerbate the problem. Consequently, it is suitable and desirable from all points of view for this Court to decide this matter of federal statutory interpretation.

III

The Fifth Circuit's decision is a misinterpretation of congressional intent. In addition to its incorrect and conflicting standard for determining when §4(b)(1) applies, the Court below misconstrued the legislative history of OSHA and the Federal Railroad Safety Act ("FRSA") and ignored the guidance given by other Acts of Congress dealing with railroads and railroad safety.

First, as to the proper construction of §4(b)(1). The Court below ignored portions of the legislative history of OSHA which compel an opposite result from that reached by the Fifth Circuit. Petitioner recognizes that Congress sought to protect the employees of American industry by the establishment of a comprehensive and uniform safety scheme. But at the same time, Congress believed it *equally* important to avoid duplication and the confusion it engenders. The decision of the Court below fails to give weight to this congressional purpose but instead ensures the very duplication and confusion which Congress sought to avoid. The linchpin of Congress' plan to avoid duplication was §4(b)(1). Its importance was such that §4(b)(1) was singled out for debate on the floor of the House.

MR. PERKINS: . . . All of these various legislative acts as railway safety and mine safety are specifically exempted under §22(b).[18]

MR. ERLENBORN: . . . I would like to engage in a colloquy . . . as to the interpretation of this language so there will not be any question as to what it means.

It is your understanding that present federal laws providing authority to the executive agency to prescribe health and safety standards that are being exercised will then exempt that *industry* from the coverage of this act?

MR. DANIELS of New Jersey: All federal agencies which are covered by the health and safety laws will be exempt from this act—with just one exception. That is the construction industry. . . .

* * *

MR. ERLENBORN: I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised. Let me ask this question.

If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; *does that then at the time it is exercised exempt an industry?*

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18. The bill under consideration was H. R. 16785, 91st Cong., 1st Sess. (1969); its exempting provision, §22(b), then provided:

> Nothing in §5 of this Act (duties of employers) shall apply to working conditions of employees with respect to whom any federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

> MR. DANIELS of New Jersey: *At the time that that authority is exercised, that industry will be exempt.*
>
> MR. ERLENBORN: So this does have a prospective effect. In other words, we are not going to interpret this language only as though it were being interpreted as to the conditions that exist on the day it becomes law, but it will have a *prospective effect* and *the future exercise of authority will then exempt an industry from coverage under this law?*
>
> MR. DANIELS of New Jersey: The gentleman is absolutely correct.[19]

116 Cong. Rec. 38381-82 (Nov. 23, 1970) (emphasis added).

It is readily apparent from the debates that Congress intended to exclude *industries* rather than parts of industries, or individual hazards, or precise elements of individual hazards. Representative Perkins specifically mentioned the Railway Safety Act as being exempted. The Court below sought to avoid the clear legislative history

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19. Representative Perkins was Chairman of the House Education and Labor Committee; Representative Daniels was Chairman of that Committee's select subcommittee on labor; Representative Erlenborn was a member of the subcommittee and the Conference Committee. Their views are entitled to be given weight in the statute's construction. *See,* United States v. Dickerson, 310 U.S. 554 (1940); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Galvan v. Press, 347 U.S. 522 (1954); Train v. Colorado Public Interest Research Group, 421 U.S. 60 (1976). The co-sponsor of OSHA was present during this colloquy, and it was engaged in during his allotted time for debate. Mr. Steiger did not comment on this exchange, and it must be presumed that it is consistent with his previous statement that "it is intended that *the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage or regulations or enforcement.*" 116 Cong. Rec. 38373 (Nov. 23, 1970) (emphasis added).

by relying on the only change in the section involved in the above colloquy—the change of "whom" to "which" in the final text. A mere grammatical change cannot correctly be the basis for ignoring a clear manifestation of congressional intent.

Secondly, the FRA has exercised its statutory authority over railroad safety in several different ways.[20] The FRA has required the railroads to file copies of their operating rules and examine railroad employees compliance with them;[21] it has comprehensively revised railroad accident and recordkeeping regulations;[22] and it has issued safety regulations regarding signal use around rolling stock.[23] In March, 1975, FRA issued an Advance Notice of Proposed Rulemaking, 40 Fed. Reg. 10693 (Mar. 7, 1975), in

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20. The long history of Federal railroad safety legislation culminated in the Federal Railroad Safety Act of 1970, 45 USC §431 et seq., which became law on October 16, 1970 just over two months prior to the passage of OSHA. Under this statute, the Secretary of Transportation is required to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 45 USC §431(a). FRA was created as part of the Department of Transportation, which acquired the jurisdiction over railroad safety previously exercised by the Interstate Commerce Commission. Department of Transportation Act, 80 Stat. 931 (1966). The Administrator of the FRA issues and enforces railroad safety regulations pursuant to its delegation of authority from the Secretary of Transportation. 49 C.F.R. §1.49.

21. 39 Fed. Reg. 41175.

22. 49 C.F.R. Part 225; These regulations were promulgated so that the FRA could "carry out effectively its regulatory responsibilities under the Federal Railroad Safety Act of 1970 and the Accident Reporting Act." 49 C.F.R. 225.1, 39 Fed. Reg. 43222. Labor filed a petition for review (5th Cir. No. 75-1091) of the Commission's decision that the railroad industry was exempted from OSHA recordkeeping regulations under §4(b)(1) because of the FRA's own regulations, 39 Fed. Reg. 25955 (July 15, 1974), but later withdrew the petition.

23. 41 Fed. Reg. 10904 (Mar. 15, 1976).

which the agency proposed to prescribe detailed occupational safety and health standards under the authority of the Federal Railroad Safety Act. A Notice of Proposed Rulemaking has now been announced as to a number of these standards. 41 Fed. Reg. 29153 (July 15, 1976). These proposals now prescribe civil penalties of at least $250.00 but not more than $2,500.00 for each day a violation continues as a separate offense. 41 Fed. Reg. 30649 (July 26, 1976).

FRA's "exercise of authority" has been measured and increasingly comprehensive. FRA regulations on record-keeping and accident reporting apply to any accident resulting from any of the alleged violations for which Southern Pacific was cited. The Advance Notice and the proposed rules themselves issued in March, 1975 and July, 1976, and which will continue a detailed, comprehensive scheme for safety in railroad repair and maintenance shops, constitute the precise "exercise" of statutory authority contemplated by Congress in §4(b) (1). This conclusion is buttressed by the statement made on the floor of the House by the co-sponsor of OSHA, Representative Steiger:

> "It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority *even though the action might be at the formative stage of regulations* or enforcement." 116 Cong. Rec. 38373 (Nov. 23, 1970) (emphasis added).

It is clear, therefore, that Congress envisioned the actions already taken by the FRA to pre-empt the railroad

industry from OSHA jurisdiction."[24] To suppose otherwise would be to presume that Congress desired the duplication, taxpayer expense, and confusion which has and necessarily will flow from the lack of an exemption.

Reference to other Acts of Congress, and their legislative histories lends further support to the existence of an exemption for the railroad industry.[25]

Finally, contrary to the Fifth Circuit's cavalier treatment of the effect of FRA activity on petitioner in this action, Southern Pacific still faces the enforcement of the standards involved, and will be required, once all judicial

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24. FRA has described the issuance of an advance notice as commencing its rulemaking process. FEDERAL RAILROAD ADMINISTRATION, A COMPREHENSIVE RAILROAD SAFETY REPORT (Report to Congress), at 48 (1976). Also, in publishing the new proposed employee safety regulations, FRA took note of comments received in response to its earlier *advance notice* as "participation in this rulemaking proceeding." 40 Fed. Reg. 30495 (July 21, 1975). The Secretary of Labor also makes use of the advance notice in the exercise of his OSHA authority. See, e.g., 41 Fed. Reg. 18430, (May 4, 1976).

25. These include The Rail Passenger Service Act of 1970, 45 U.S.C. § 501 et seq., Pub. L. 91-518, 84 Stat. 1328 (Oct. 30, 1970); Amtrak Improvement Act of 1973, 45 U.S.C. §502 et seq.; Amendments to the Federal Railroad Safety Act, Pub. L. 93-633, 88 Stat. 2156 (1974).

Of special significance is the Conference Report (93rd Congress, 1st Session, House of Representatives, Report No. 93-587, October 12, 1973) on the Amtrak Improvement Act in which it is pointed out:

> "The Federal Railroad Safety Act of 1970, enacted only two weeks prior to the Rail Passenger Service Act, defined the Secretary of Transportation's jurisdiction over railroad safety to include 'all areas of railroad safety.' *It is the intent of the committee of conference to make clear that the Secretary's jurisdiction over railroad safety is exclusive.*" (emphasis added)

Congress reaffirmed in 1973 the plan it enacted in 1970 in FRSA, that Transportation alone shall have the power to prescribe safety regulations for the railroads. The Seceretary has followed that directive.

review has been completed, to comply with the terms of the abatement originally prescribed in the citation. Penalties may be imposed if the violations are uncorrected following expiration of the abatement period. Labor may also reinspect the premises of Southern Pacific in order to check on compliance. A decision on the validity of the original citation, therefore, depends on the *present* scope of the exemption.

The change in circumstances brought about by the most recent FRA exercises of authority is material and is further reason to grant review of this case. The principle of *NLRB v. Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428 (1947) and *United States v. Schooner Peggy*, 1 Cranch (5 U. S.) 103, 110 (1801) (Marshall, C. J.) makes clear that the reviewing court should consider the material change of circumstances occurring after an order by an administrative agency, and either render a decision on the basis of the new circumstances, or remand the case to the agency.[26] By failing to take either of these two courses, the Court below has placed Southern Pacific in the position of perhaps resisting abatement requirements or fines on the basis of a present exemption at the risk of liability for the cumulative fines prescribed by OSHA for noncompliance. It is readily apparent that a definitive decision in this area is needed, and the absence thereof is harmful to petitioner and will lead to multitudinous litigative possibilities.

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26. See also, Bell v. Maryland, 378 U.S. 226, 238-39 (1964).

CONCLUSION

Whether OSHA has any application to the railroad industry is a matter of national importance. Moreover, if OSHA does apply to railroad operators, a final and uniform decision defining the scope of such application is equally important. A definitive resolution of the question, resolving the conflicting, confusing and unfeasible judicial standards which have arisen is necessary for the attainment of the Congressional scheme in enacting both OSHA and FRSA. We submit, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1977

CERTIFICATE OF SERVICE

The undersigned Member of the Bar of the Supreme Court of the United States, representing Petitioner Southern Pacific Transportation Company, certifies that on this 8th day of April, 1977, three true and correct copies of Southern Pacific's Petition for a Writ of Certiorari were served upon the following counsel for all adverse parties:

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Original Signed By RICHARD R. BRANN

RICHARD R. BRANN

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

APPENDIX

APPENDIX

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

DECISION AND ORDER
OSHRC Docket No. 1348

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Complainant

Railway Employees Department, AFL-CIO,
Intervenor

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Respondent

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Hearing held November 8, 1972, at Houston, Texas.
Judge John C. Castelli, presiding.

STATEMENT OF THE CASE

This is a proceeding under Section 10 of the Occupational Safety and Health Act of 1970 [29 USC 651 *et seq.*, hereafter called the Act] contesting a citation issued by the Complainant against the Respondent under the authority vested in the Complainant by Section 9(a) of the Act. The citation alleges that as the result of an inspection of a workplace under the ownership, operation or control of the Respondent located at the Southern Pacific Transportation Company's Houston General Shops, Houston, Texas, and described as the Diesel Service Shop, Drop Pit Area, the Respondent has violated Section 5(a) (2) of the Act by failing to comply with certain occupational safety and health standards promulgated by the Secretary of Labor pursuant to Section 6 thereof.

The citation which was issued on August 2, 1972, alleges four nonserious violations resulting from a failure to comply with standards promulgated by the Secretary pursuant to Section 6, and codified in 29 CFR Parts 1903, 1904 and 1910. The Respondent filed with the Secretary a notice of contest on August 25, 1972, contesting the items contained in the citation and the proposed penalties issued therefrom. The basis of the company's appeal, according to the notice of contest filed on that date, was their contention that the Respondent is exempt from coverage by the Occupational Safety and Health Act and the standards issued under the Act by Section 4(b) (1) of the Act.

The standards and description of the alleged violations contained in said citation read as follows:

Item 1. 29 CFR 1903.2(a). Poster informing employees of protection and obligation provided for in the Act was not displayed. Proposed penalty $50.00.

Item 2. 29 CFR 1904.2(a). The Log of Occupational Injuries and Illnesses was not maintained. Proposed penalty $100.00.

Item 3. 29 CFR 1910.179(j) (2) (iii). A monthly signed inspection report on crane hoist attachments, including hooks, was not maintained. No penalty.

Item 4. 29 CFR 1910.179(b) (5). Each hoist of the overhead crane did not have its rated load marked on it. No penalty.

Pursuant to the enforcement procedure set forth in Section 19(a) of the Act, the Respondent was notified by letter dated August 2, 1972, from Thomas T. Curry, Area Director of the Houston, Texas Area, Occupational Safety and Health Administration, U. S. Department of Labor, proposing to assess penalties for the violations as alleged in the citation in the total amount of $150.00. After Respondent contested this enforcement action and a complaint and an answer had been filed by the parties, the case came on for hearing at Houston, Texas on November 8, 1972.

The Secretary of Labor was represented by Mrs. Joan T. Winn, Regional Solicitor's Office, and the Respondent was represented by Mr. Richard R. Brann of the firm of Baker and Botts, Houston, Texas. At the hearing, the Railway Employees' Department, AFL-CIO was granted leave to intervene on behalf of employees affected by violations of the Act, and was therein represented by Mr. William J. Hickey of the firm of Mulholland, Hickey and

Lyman, Washington, D. C. No other affected unrepresented employee sought to participate in the hearing although given an opportunity to do so.

In the course of said hearing, the parties including counsel representing the Intervenor, the Railway Employees' Department, AFL-CIO, entered into a written stipulation setting forth the issue involved and relevant facts relating thereto and requested this cause be submitted to the Occupational Safety and Health Review Commission for decision on the pleading of the parties, the stipulation entered into by the parties and the briefs submitted by said parties. The stipulation and requests contained therein were approved by the undersigned Judge and made part of the record.

Subsequent to receipt of the aforementioned stipulation, the undersigned Judge to whom the cause was assigned by an Order of the Commission dated October 27, 1972, reviewed the pleadings and other documents filed in the case including the citation and notification of proposed penalty; notice of contest; complaint; answer; the stipulation of fact; the Secretary's brief and reply brief; the Respondent's brief and reply brief; and the Intervenor's brief. The aforesaid documents were considered as the record in this case and this decision is based thereon.

FINDINGS OF FACT

The undersigned Judge finds and determines that the following provisions of the written stipulation entered into by the parties on November 8, 1972, properly state the issue, fully recite relevant facts relating thereto, and agree to the disposition of issues concerning violations of stan-

dards contained in the citation together with the proposed penalties relating thereto:

STIPULATION

Now come the parties hereto and stipulate that the issue before the Commission is as follows:

Whether the Southern Pacific Transportation Company is subject to regulation under the provisions of the Occupational Safety and Health Act as concerns any of the working conditions of its employees, and in connection therewith further stipulate the following:

1. Southern Pacific Transportation Company is a Delaware Corporation, having its main office and headquarters in San Francisco, California.

2. Southern Pacific Transportation Company, and its subsidiaries, own and operate, as a public carrier, railroad facilities in the states of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, Louisiana, Arkansas, Tennessee, Missouri and Illinois. On tracks running through the foregoing states, Southern Pacific Transportation Company and its subsidiaries transport a variety of commodities as a public carrier by rail.

3. In Houston, Texas, Southern Pacific Transportation Company maintains an office facility, the Englewood Freight Yards and the Houston General Shops. The Houston General Shops are used to repair and service Respondent's locomotives, freight cars and related equipment. Located at the Houston General Shops is an area known as the Houston Die-

sel Service Shop which contains an area known as the Drop Pit. The purpose of the Drop Pit and its equipment is the removal of traction motors from locomotives in order to service and repair such motors.

4. On June 9, 1972, Mr. Verne Bechtel, Compliance Officer for the U. S. Department of Labor, Occupational Safety and Health Administration, served a Complaint on Respondent and conducted an investigation of the Houston Drop Pit area. By citation dated August 2, 1972, Respondent was served with a Citation citing Respondent as having violated the provisions of the Occupational Safety and Health Act of 1970 with respect to the following:

(a) Poster informing employees of protection and obligation provided for in the Act was not displayed. 29 CFR 1903.2(a).

(b) The log of occupational injuries and illnesses was not maintained. 29 CFR 1904.2(a).

(c) A monthly signed inspection report of crane hoist attachments, including hooks, was not maintained. 29 CFR 1910.179(j) (2) (iii).

(d) Each hoist of the overhead crane did not have its rated load mark on it. 29 CFR 1910.179 (b) (5).

5. If the Commission finds that Respondent is subject to regulation under the provisions of the Act as concerns the standards or regulations alleged in the Secretary's complaint, then Respondent admits violation of said standards and regulations and the propriety of the penalties proposed.

6. The following classifications of railroad employees are affected by the violations alleged in the Secretary's Complaint herein:

(1) machinists

(2) electricians

(3) sheetmetal workers

(4) carmen

(5) boilermakers

(6) laborers

(7) clerks

7. The foregoing classifications of employees are represented by the following labor organizations:

(1) International Association of Machinists and Aerospace Workers.

(2) International Brotherhood of Boilermakers, Iron Ships Builders, Blacksmiths, Forgers and Helpers.

(3) Sheetmetal Workers International Association.

(4) International Brotherhood of Electrical Workers.

(5) Brotherhood of Railway Carmen of America.

(6) Brotherhood Railway Clerks & Steamship Clerks, Freight Handlers, Express & Station Handlers.

8. This stipulation is for purposes of the captioned proceeding only.

In addition thereto, if the issues on the merits of the case are reached, it will be necessary to decide that, if Respondent violated standards prescribed by 29 CFR 1903.2(a), 29 CFR 1904.2(a), 29 CFR 1910.179(j)(2)(iii), and 29 CFR 1910.179(b)(5), as set forth by the four items of the citation, whether the proposed penalties relating thereto were reasonable and appropriate, considering the gravity of the violations, the size of the employer's business, and his past history and good faith.

LAW AND OPINION

The jurisdictional question raised by and agreed upon by the parties is whether the Southern Pacific Transportation Company is subject to regulation under the provisions of the Occupational Safety and Health Act of 1970, as concerns any of the working conditions of its employees.

Section 4(b)(1) of the Act [29 USC 653(b)(1)] states in pertinent part:

> "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Obviously, Section 4(b)(1) was designed to exclude from the Act's coverage employees' working conditions when another Federal agency had statutory authority to prescribe safety and health standards and regulations governing such working conditions and had actually exercised this authority by prescribing such regulations or standards. This issue raises for determination the ancil-

lary question of whether by virtue of Section 4(b) (1) of the Act, "employments" or "industries" are outside the scope of the Act or whether by virtue of Section 4(b) (1) of the Act it is "particular working conditions of employees" of Respondent regarding which another Federal agency has exercised its statutory authority to prescribe or enforce standards that are excluded.

The Respondent submits that under the section cited *supra* the Act provides for exclusion of "employments" or "industries" and not part of industries or individuals from coverage under the Act when another Federal agency exercises its authority to regulate the working conditions of employees in such industry with respect to safety and health. It is a broad exclusion which turns on the pivotal consideration — the exercise of statutory authority to prescribe or enforce safety and health standards or regulations by another agency. It is argued that the exclusion of "working conditions or employees" in Section 4(b) (1) is an exclusion of "employments" or "industries" where another agency exercises regulatory authority with respect to safety over the employees' working conditions. The Respondent thus contends that since the Department of Transportation through the Federal Railroad Administration has exercised considerable authority in regulating and prescribing safety standards with respect to the working conditions of railroad employees, then nothing in the Occupational Safety and Health Act of 1970 applies to the railroad industry.

There is little room for argument that starting with the Boiler Inspection Act in 1911 Congress began delegating administrative authority in the area of railroad safety to certain Federal agencies. This Act was later amended

to become the Locomotive Inspection Act which authorizes the Department of Transportation to adopt all rules, standards and instructions necessary for the safety of locomotives. Comparable regulatory authority over other aspects of railroading was given to the Department of Transportation by the Signal Inspection Act and the Power or Train Brakes Safety Appliance Act of 1958. It is admitted that these statutes extend only to specified areas of railroading. It is noted that prior to 1970, only the Accident Reports Act of 1910 related to all aspects of a railroad operation. This Act and its regulations promulgated thereunder require railroads to prepare and submit monthly reports on all accidents resulting in death, injury or property damage arising from the operation of all phases of railroading. In October 1970, the Congress passed the Federal Railroad Safety Act of 1970, which while retaining in effect all preceding railroad safety legislation, granted to the Secretary of Transportation complete authority to prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety. With this considerable statutory authority and the exercising of such authority to regulate the working conditions of railroad employees, it is the Respondent's contention that the Secretary of Labor under the Occupational Safety and Health Administration is expressly barred from asserting jurisdiction under the Act.

It is the position of the Complainant that the limited effect of Section 4(b)(1) is to remove specific working conditions of employees from jurisdiction of the Department of Labor where another Federal agency has exercised its statutory authority respecting occupational safety and health with regard to those specific working condi-

tions. As to other working conditions with respect to which another Federal agency has not exercised its authority; i.e., has not promulgated standards, authority of the Department of Labor under Occupational Safety and Health Administration would continue to apply. This position is supported by Judge's decisions in *Finelberg Packing Company, Inc.*, OSHRC Docket No. 61; *Segman Meat Company, Inc.*, OSHRC Docket No. 251; and *Elevating Boats, Inc.*, OSHRC Docket No. 589.

It is further contended that it was not the intent of Congress in Section 4(b)(1) to provide any general exemptions for any industry, business, or category of employers or employees from the Act. It is Complainant's position that this narrow and strict construction of Section 4(b)(1) of the Act comports with the general purpose of the Occupational Safety and Health Act of 1970 requiring every employer to provide safe and healthful working conditions for his employees.

Section 4(b)(1) in its literal text and as explained in the course of the legislative history demonstrated some ambiguities in interpretation when the various other sections or provisions of the Act and regulations were construed in conjunction with determining its significance or intended meaning.

The Congressional debates or discussion gleaned from the legislative history appeared consistent at times in supporting the interpretation that it was the intent of the Congress by Section 4(b)(1) to remove from coverage by the Act only specific employment conditions or subjects upon which another Federal agency has already promulgated a safety regulation or standard, allowing the Department of Labor to exercise jurisdiction over any

other particular subject or condition as long as another Federal agency with authority in the field had not prescribed standards thereon. The contents of Senate Report No. 91-1282 explaining coverage, applicability and relationship to other laws stated:

> "The Bill does not authorize the Secretary of Labor to assert authority under this Bill over *particular working conditions* (emphasis added) regarding which another Federal agency exercises statutory authority to prescribe or enforce standards affecting occupational safety and health."
>
> (Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Congress, 1st Session, p. 162.)

Additionally, Congressman William Steiger's comments interpret Section 4(b)(1):

> ". . . the Act shall not apply where another Federal agency is exercising authority to prescribe or enforce occupational safety and health standards . . . while this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health, but has taken no action, it is anticipated that these instances will be extremely rare."
>
> (Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 1st Session, p. 997.)

During the House debate, however, the following colloquy took place wherein two members of the House

Labor Committee repeatedly refer to the exclusion as an "industry" exemption:

> "MR. ERLENBORN. May I question the Chairman of the subcommittee a little more closely on that question because I think the interpretation of this language [Section 4(b)(1)] might be a little bit tricky. I know the reason it is worded this way.
>
> "It says that:
>
> > "Nothing in section 5 of this Act shall apply to working conditions of employees with respect to whom any Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.
>
> "Now let me pose a couple of alternative questions.
>
> "If there is authority under the Federal law, but it has [not] yet been put into effect and it is not being exercised by the executive agency because they have no rules and regulations, and [do not] exercise that authority—then this does apply; is that correct?
>
> "MR. DANIELS of Virginia. [sic] Yes; that would be correct. The gentleman has placed his finger on the key word—and that word is "exercise."
>
> "If an agency fails to pursue the law and exercise the authority that has been given to it, then this law will step in.
>
> "MR. ERLENBORN. In other words, *the mere existence of statutory authority does not exempt an industry?* It is the exercise of that authority pursuant to the statute that does exempt it; is that correct?
>
> "Mr. Daniels of New Jersey. *That is correct.*

"MR. ERLENBORN. I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised.

"Let me ask this question.

"If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; does that then at the time it is exercised exempt an industry?

"MR. DANIELS of New Jersey. *At the time that that authority is exercised, that industry will be exempt.*

"MR. ERLENBORN. So this does have a prospective effect. In other words, we are not going to interpret this language only as though it were being interpreted as to conditions that exist on the day it becomes law, but it will have a prospective effect and *the future exercise of authority will then exempt an industry from coverage under this law?*

"MR. DANIELS of New Jersey. The gentlemen [sic] is absolutely correct."
(emphasis added)

(Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 1st Session, pp. 1019-1020.)

Moreover, when reading Section 24(a) of the Occupational Safety and Health Act of 1970 in conjunction with Section 4(b)(1) the wording of Section 24(a) suggests that it is "employment" which Section 4(b)(1) excludes.

Since diametrically opposite interpretations are suggested in the above discussion, this review of the Act and legislative history does little to give a definite answer as to the legislative intent concerning the actual meaning of Section 4(b)(1) as it related to the issue before the Commission.

It is apparent that mere reference to the legislative history or to the Act itself will not resolve the issue and it will be necessary to look to additional sources for full resolution.

As aptly noted by Chief Justice Marshall in *United States v. Fisher,* 2 Cranch 358, 386 (1805), "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . ." (Respondent's brief, p. 4)

A statute should always be carefully construed in conjunction with its other provisions to the end that they may be harmonious, consistent, and *result ultimately in accomplishing its stated purpose.* (emphasis added).

The declared purpose enunciated by the Congress in Occupational Safety and Health Act of 1970 was . . .

> ". . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ."

The one point which the legislative history demonstrated conclusively and agreed on by all members of the Subcommittee on Labor was the clearly manifested Congressional intent to provide comprehensive occupational safety and health coverage for all employees. Ancillary thereto was the expressed hope to reduce the number and severity of work-related injuries and illnesses which . . . are result-

ing in ever-increasing human misery and economic loss. It appears necessary that to resolve the questions herein raised that we begin at a point where there is consensus and where Congressional intent is clear and positively manifest. It is imperative that a meaning be attached to Section 4(b)(1) which reflects ultimately the fuifillment of the intended purpose of the Act.

The Respondent argues that the Secretary of Labor's position—that particular working conditions of railroad employees are not excluded from the Occupational Safety and Health Act by reason of Section 4(b)(1), but rather are only "partially" excluded from the Act to the extent that another Federal agency has regulated the exact subject matter which the Secretary of Labor seeks to regulate under the Act—would lead to absurd and illogical consequences and would greatly undermine the legislative effort to establish a unified, consistent body of safety legislation. The undersigned Judge is not persuaded that this interpretation is reflected by Congressional support nor does it comport with the purpose declared by the Occupational Safety and Health Act.

In applying an exemption created by the Act, it must be remembered, since the overriding emphasis of its legislative history is first—provide comprehensive occupational safety and health coverage for all employees, and, second—avoid duplication and impratical or unreasonable consequences, that broad construction of the exemption in this instant would be contrary to the express purpose of the Act. It appears to the undersigned Judge that the Respondent's position on this question would unquestionably exclude from coverage employees working in the area of railroading where no statutory authority has been

exercised to protect against known risks to safety and health. These employees should have the same protection as those employees so covered under the Occupational Safety and Health Act. They deserve no less.

It is granted that over a period of several years, Congress has carefully developed a statutory pattern for the regulation of safety in the railroad industry. Nothing in the Occupational Safety and Health Act undermines this purpose, it merely supplements it and only until such time as the Federal agency so charged promulgates safety standards to afford protection to those railroad employees not now falling within the umbrage of the various railroad safety legislation previously alluded to. When that Federal agency provides the protection as provided for by the Occupational Safety and Health Act, then the provisions of the Occupational Safety and Health Act no longer apply to those working conditions. The Respondent's argument that the Complainant's refined, narrow interpretation of Section 4(b)(1) inevitably would lead to countless, vexing jurisdictional issues with respect to the development of enforcement of safety standards or regulations does not necessarily follow and has not thus far been apparent.

Concurrent jurisdiction in application of safety and health standards was readily recognized by the Congress as well as the Federal Railroad Administration and the Occupational Safety and Health Administration, and statutory provision by the Congress as well as procedures by each agency were adopted and observed to avoid duplication, inconsistency and unreasonable consequences. The Memorandum of Understanding executed by officials of the Department of Labor and the Department of Trans-

portation on May 2, 1972, show that the Departments were aware that questions concerning the enforcement of regulations and standards of each agency would arise and procedures were devised for insuring against such problems.

Moreover, pursuant to Section 4(b)(3) of the Occupational Safety and Health Act, adequate authority is afforded Federal agencies to work together and to cooperate with the Congress in the area of safety legislation so that wasteful duplication, inconsistency and overlapping jurisdiction can be avoided and at the same time assure so far as possible *every working man and woman in the Nation safe and healthful working conditions.* (emphasis provided).

The undersigned Judge agrees with a position that in applying an exemption created by the Act it should be strictly construed to the end that the exemption will not be enlarged beyond its necessary extent and in order that the Act will accomplish as fully as possible the remedial purpose for which it was designed. This stated purpose cannot be accomplished through the Respondent's stated construction of Section 4(b)(1).

It is thus concluded that the Respondent is subject to regulation under the provisions of the Occupational Safety and Health Act of 1970 as concerns the working conditions of the Respondent's employees that are the subject of the Secretary's complaint, except for the allegation contained in paragraph VIII of said complaint, and that Section 4(b)(1) does not prohibit the Secretary from asserting his authority in matters made subject of the complaint in this proceedings, except for the allegation contained in paragraph VIII of said complaint.

Having reached the issues on its merits, reference is made to paragraphs 4 and 5 of the joint stipulation set forth *supra.*

Paragraph 4 of the stipulation stated that Respondent, on August 2, 1972, was served with a citation for the violations of standards promulgated pursuant to the provisions of the Occupational Safety and Health Act of 1970 as follows:

> "(a) Poster informing employees of protection and obligation provided for in the Act was not displayed, 29 CFR 1903.2(a).
>
> (b) The log of occupational injuries and illnesses was not maintained, 29 CFR 1904.2(a).
>
> (c) A monthly signed inspection report of crane hoist attachments, including hooks, was not maintained, 29 CFR 1910.179(j)(2)(iii).
>
> (d) Each hoist of the overhead crane did not have its rated load mark on it, 29 CFR 1910.179(b)(5)."

Paragraph 5 reads:

> "If the Commission finds that Respondent is subject to regulation under the provisions of the Act as concerns the standards or regulations alleged in the Secretary's Complaint, then Respondent admits violation of said standards and regulations and the propriety of the penalties proposed."

Thus, all violations of standards as charged by the above-stated citation dated August 2, 1972, and the respective proposed penalties therein having been admitted by the Respondent, are deemed final orders of this Commission except for item 2 of the citation and further alleged in paragraph VIII of the complaint.

Under the provisions of the Accident Reports of 1910, c. 208, § 1, 36 Stat. 350, it is stated that . . . "It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided,* That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the commission."

Pursuant to this authority, regulations were promulgated and codified at 49 CFR 225 concerning the railroads' obligation to report monthly all accidents and illnesses occurring in connection with its operation.

It appears that the Department of Transportation did in fact exercise statutory authority to prescribe and enforce the aforementioned regulations in that the regulations prescribed the making and submitting of monthly reports of all accidents and illnesses occurring in connection with all phases of Respondent's operation, which reports are also prescribed under the occupational safety and health standards [29 CFR 1904.2(a)] promulgated by the Secretary of Labor and cited against this Respondent.

Therefore, pursuant to Section 4(b)(1) of the Act, since another agency is actually exercising its authority in this area, it is concluded that the Secretary's authority under the cited occupational safety and health standards promulgated under the Act [item 2 of the citation and paragraph VIII of the complaint] may not legally be asserted against this Respondent in so far as maintaining a log of occupational injuries and illnesses.

CONCLUSIONS OF LAW

1. As hereinafter excepted, Southern Pacific Transportation Company, Respondent, is subject to regulation under the provisions of the Occupational Safety and Health Act of 1970, as concerns the working conditions of the Respondent that are subject of the Secretary's complaint and, as hereinafter excepted, Section 4(b)(1) does not prohibit the Secretary from asserting his authority in matters made subject of the complaint in this proceedings.

2. Section 4(b)(1) of the Occupational Safety and Health Act of 1970 does not provide for an overall general exemption of the railroad industry in matters made subject of the complaint in this proceedings.

3. On June 9, 1972, Southern Pacific Transportation Company, Respondent, was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970. As hereinafter excepted, the Occupational Safety and Health Review Commission has jurisdiction of the parties and subject matter herein pursuant to Section 10(c) of the Act.

4. As hereinafter excepted, Section 5(a)(2) of the Act [29 USC 654(a)(2)] imposed a duty on Respondent to comply with safety and health regulations promulgated by the Secretary pursuant to Section 6(a)(2) of the Act.

5. All standards in violation of Section 5(a)(2) of the Act on June 9, 1972, by its noncompliance with certain occupational safety and health regulations as charged by a citation issued Respondent on August 2, 1972, and further alleged in the complaint filed September 8, 1972, having been admitted by Respondent, are deemed final orders of this Commission, except as noted below.

6. The Department of Transportation exercised statutory authority and prescribed and enforced standards regarding preparing and submitting monthly reports of all accidents and illnesses occurring in connection with Respondent's operation, and pursuant to Section 4(b)(1) of the Act and 29 CFR 1910.5 of Occupational Safety and Health Administration standards, the Secretary's cited occupational safety and health standards promulgated under the Act and codified at 29 CFR 1904.2(a) [item 2 of the citation and paragraph VIII of the complaint] may not be legally asserted against this Respondent in so far as maintaining a log of occupational injuries and illnesses.

7. The total proposed penalty for the aforesaid violations set forth in conclusion number 5 in the amount of $50.00 is appropriate, giving due consideration to the size of the business of the em-

ployer, the gravity of the violation, good faith of the employer, the employer's previous history and its action to abate the conditions.

ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED that:

1. Item 2 of the citation issued Respondent August 2, 1972, and further alleged in paragraph VIII of the complaint filed September 8, 1972, alleging violation of 29 CFR 1904.2(a), and the proposed penalty thereon of $100.00 be and is VACATED.

2. All other violations of standards contained in the citation issued Respondent August 2, 1972, and further alleged in the complaint filed September 8, 1972, having been admitted by the Respondent and deemed final orders of this Commission, together with the respective proposed penalty thereon in the total amount of $50.00, are AFFIRMED in all respects.

/s/ JOHN C. CASTELLI
John C. Castelli
Judge, OSHRC

DATE: January 8, 1973
Dallas, Texas

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC DOCKET No. 1348

SECRETARY OF LABOR, Complainant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Respondent

RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO, Authorized Employee Representative

Decision

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

This matter[1] presents an important question of statutory interpretation involving section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*, hereinafter "OSHA"). It arose out of an inspection conducted by the Department of Labor (Labor) of Respondent's (Southern Pacific) shop facility located in Houston, Texas. As a result of the inspection Labor cited Southern Pacific for failure to comply with certain crane safety standards,[2] for failure to post an informational

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1. This case was consolidated with the case of *Penn Central Transp., Co.*, OSHRC Docket No. 738, for purposes of review. Subsequently both cases were consolidated with *Union Pacific R.R.*, OSHRC Docket No. 1697 and *Seaboard Coastline R.R.*, OSHRC Docket No. 2802 for purposes of oral argument. Pursuant to Commission Rule 10, we hereby sever the aforementioned cases so that separately written determinations may be made in each.

2. 29 C.F.R. 1910.179(b)(5) and 179(j)(2).

poster,[3] and for failure to maintain a log of injuries and illnesses[4] contrary to sections 5(a)(2) and 8(c) of OSHA. Southern Pacific duly contested and the matter came on for hearing before Judge John C. Castelli. At the hearing, Southern Pacific conceded that it had not complied with the standards and regulations alleged to have been violated. Rather, it argued that in view of the terms of section 4(b)(1) of OSHA it is excepted or exempted[5] from compliance because the Secretary of the Department of Transportation (DOT) has exercised his authority pursuant to the Federal Railway Safety Act of 1970, 45 U.S.C. 421 *et seq.* (FRSA) and other earlier railway safety acts to promulgate and enforce safety regulations affecting the working conditions of railway employees. Labor concedes that DOT has authority to regulate all areas of employee safety for the railway industry. It argues that Southern Pacific is not excepted or exempted from OSHA and the standards and regulations cited in this case because DOT has not exercised its authority in the areas covered by the said standards and regulations.

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3. 29 C.F.R. 1903.2(a).

4. 29 C.F.R. 1904.2(a).

5. Despite some confusion as to the appropriate designation for section 4(b)(1), the parties generally agree that it operates to exclude something (whether particular industries or, as shown *infra*, particular working conditions) from the general applicability of the Act. Thus, the provisions of section 4(b)(1) are in the nature of an "exception", the function of which is to exempt (or exclude) some portion from the operative effect of the Act. See *Gatliff Coal Co. v. Cox.*, 142 F.2d 876 (6th Cir. 1944); *United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Electric Ry. Employees Local 1210 v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3rd Cir. 1951). Accordingly, the party who claims the benefit of an exception has the burden of proving its entitlement thereto. *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

The adverse positions may be summarized as follows: Southern Pacific contends that section 4(b)(1) exempts all working conditions in the railway industry because DOT has exercised some of its authority; and Labor contends that section 4(b)(1) exempts only those areas of employee safety in which DOT has exercised its authority. Judge Castelli, in essence, adopted Labor's view. He concluded that DOT had not exercised its authority to regulate railway employee safety in shop and repair facilities, and he affirmed the alleged violations of the OSHA crane standards and the alleged informational poster violation. He vacated the recordkeeping violation for the reason that DOT has promulgated accident reporting requirements.

On review of his decision Southern Pacific asks for reversal for the reasons given by it below; Labor asks for affirmance where violations were found below and for reversal of the Judge's disposition of the recordkeeping allegation; and DOT, appearing as an *amicus curiae* at our invitation, seeks affirmance of Judge Castelli's disposition. We have reviewed the record and have considered the arguments of all participants in this matter. For the reasons given hereinafter we affirm.

Section 4(b)(1) provides in pertinent part as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653 (b)(1).

Obviously, the section is not self-defining for its terms can be construed to create the broad exemption Southern

Pacific seeks or the narrow exemption for which Labor and DOT argue. Moreover, all parties point to the legislative history of the section as providing support for their respective views. And, indeed, the legislative history is as persuasive for one side as it is for the other.[6] Accordingly, it cannot be said to be dispositive of the issue.

Therefore we turn to the congressional findings and statements of purpose and policy for guidance. OSHA came about because workplace injuries and illnesses impose "a substantial burden upon, and are a hinderance to, interstate commerce," 29 U.S.C. 651. In order to alleviate this burden, Congress determined its purpose and policy was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). This policy can only be effectuated by interpreting OSHA to include rather than exclude working conditions of employees. Otherwise it cannot be said that the Nation's human resources were preserved "so far as possible."

But the interpretation sought by Southern Pacific would operate to exclude any coverage of working conditions in railway offices, shops, and repair facilities because DOT says it does not now regulate safety and health in such areas and it does not contemplate regulating these areas in the future. In this regard, we deem it highly significant that DOT joins with Labor in requesting a narrow interpretation of section 4(b)(1) for as DOT says "[t]o interpret the exemption as an 'industry' exemption would leave

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6. *See*, e.g., *Legislative History of the Occupational Safety and Health Act of 1970*, Committee Print, pgs. 162, 997, 1019, 1020, 1037, 1223 (1971).

wide gaps in coverage."[7] We too cannot believe Congress intended such gaps in coverage.

Moreover, the interpretation sought by labor and DOT accords with the rule that exemptions from humanitarian and remedial legislation are to be narrowly construed. *A. H. Phillips, Inc. v. Walling,* 324 U.S. 490 (1945); *Spokane & I.E.R. Co. v. United States,* 241 U.S. 344 (1916); *Sterns v. Hertz Corp.,* 326 F.2d 405 (8th Cir., 1964); *Herren v. United States,* 317 F. Supp. 1198 (D.C. Texas; 1970), *aff'd* 443 F.2d 1363 (5th Cir., 1971).

Finally, we are not persuaded to a different result by the fact that the 91st Congress enacted the FRSA and the Rail Passenger Service Act of 1970 (P.L. 91-518) during the same session as and prior to the enactment of OSHA. As to the FRSA the question is not whether DOT has authority but rather whether that authority has been exercised. We have already addressed this argument. As to the Rail Passenger Service Act the argument is that since section 405(d) thereof precludes application of safety standards promulgated pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) to railroad employees OSHA standards could not have been intended to apply to such employees. The short answer is that we are dealing with OSHA and not with the Contract Work Hours and Safety Standards Act. In any event construction safety standards are not involved in this case.

Accordingly, we conclude that section 4(b)(1) of OSHA does not provide an industry exemption. Rather, it provides an exemption for specific working conditions. Thus, as in this case, when a Federal agency or depart-

7. Brief of the DOT at pg. 8.

ment has authority to regulate safety and health working conditions in, e.g., railroad shops, and does not exercise that authority the said working conditions are subject to OSHA regulations.

We turn now to the matter of recordkeeping for a different situation pertains. DOT has exercised its statutory authority in this area; it requires accident reporting by railroad employers.[8] Labor seeks reversal of Judge Castelli's decision to vacate on the basis that recordkeeping requirements are not "working conditions" within the meaning of the exemption. We cannot agree.

A requirement to compile and maintain accident records is not unlike a requirement to collect, compile, and maintain statistical data relating to occupational safety and health. However, according to section 24(a) of OSHA (29 U.S.C. 673(a))[9] Labor cannot impose a statistical program upon "employments excluded by section 4" of OSHA. In our view, section 4(b)(1) constitutes the only exclusionary provisions to be found in section 4.[10] Since both "working conditions" and statistical programs as to "employments" are excludable by operation of section 4(b)(1) we think it would make for an

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8. See 49 C.F.R. 225.

9. Section 24(a) provides, in pertinent part:
"In order to further the purposes of this Act, the Secretary . . . shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act, but shall not cover employments excluded by section 4 of the Act." 29 U.S.C. 673(a).

10. Labor would have us adopt a conclusion that the exclusionary provision of section 24(a) refers to section 4(a) rather than 4(b)(1). The argument is misplaced. By its plain terms section 4(a) refers to where OSHA shall apply; 4(b) states where it shall not apply.

inharmonious construction of OSHA to require recordkeeping as to excepted or exempted working conditions or employments. Moreover, by its own terms, section 4(b)(1) applies to the entire OSHA and thus necessarily provides for an exemption from the recordkeeping requirements of section 8 (29 U.S.C. 657). Finally, the terms of section 8(d) (29 U.S.C. 657(d)) require the avoidance of imposing unnecessary duplication of recordkeeping requirements on employers. DOT requires recordkeeping, and, as we see it, Labor's argument, if upheld herein, would result in unnecessary duplication.[11]

Labor also argues for affirmance of its citation because its regulation involved herein (29 C.F.R. 1904.2(a)) goes further or requires more than DOT's regulation. But as Commissioner Cleary said in speaking for the majority in *Mushroom Transportation Company, Inc.*, OSHRC Docket No. 1588, BNA 1 O.S.H.C. 1390, 1392, CCH Employ. S. & H. Guide, para. 16,881 at 21,591 (1973), "Section 4(b)(1) does not require that another agency exercise its authority in the same manner or *in an equally stringent manner.*" (emphasis added). We view Labor's argument herein to be directed to the sufficiency or adequacy of the DOT regulation. Accordingly, our decision in *Mushroom Transportation* is controlling and the citation must be vacated as to the recordkeeping allegation.

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11. Through its brief filed herein DOT has offered to make its accident records available to Labor. We see no reason why the offer should not be accepted as a practical solution to the problem. Moreover, we believe the two departments are fully capable of resolving any differences they might have as to the kind of records that are required.

Therefore, the Judge's decision is affirmed, and it is so ORDERED.

FOR THE COMMISSION:

/s/ WILLIAM S. MCLAUGHLIN
William S. McLaughlin
Executive Secretary

DATE: November 15, 1974.

CLEARY, Commissioner, CONCURRING IN PART AND DISSENTING IN PART:

I concur with the holding of the lead opinion that section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), does not provide an industry exemption for the railroad industry. I dissent, however, from the holding that the recordkeeping requirements under the Act are inapplicable to respondent because it is already covered by the accident reporting provisions of the Federal Railway Safety Act of 1970, 45 U.S.C. § 421 *et seq.*

I.

On several other occasions the Commission has been called on to determine whether the language of section 4(b)(1) of the Act exempts various working conditions from the Act's coverage. In the Commission's first major decision on this point, *Mushroom Transport. Co., Inc.*, No. 1588 (November 7, 1973), *petition for review dismissed*, No. 74-1034 (3d Cir. 1974), the Commission held that a common carrier who was regulated by the Motor Carrier Safety Regulations of the Department of

Transportation was exempted from compliance with specific OSHA standards related to wheel chocks.[12] The Commission's decision emphasized three considerations: Section 4(b)(1) is intended to avoid duplication in the enforcement of occupational safety and health regulations; once another federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions; and section 4(b)(1) does not require that the other agency's regulations be similar or even equally stringent.

In *Fineberg Packing Co.*, No. 61 (February 22, 1974), the Commission held that a meat processor who was subject to the provisions of the Federal Meat Inspection Act as amended by the Wholesome Meat Act of 1967, 21 U.S.C. § 601 *et seq.*, was not exempted from coverage under the Occupational Safety and Health Act. The Commission noted that the purpose of the Wholesome Meat Act is primarily to protect consumers, even though employees may receive incidental protection.[13]

> To be cognizable under section 4(b)(1), we conclude that a different statutory scheme and rules thereunder must have a policy of purpose that is consonant with that of the Occupational Safety and Health Act. That is, there must be a policy or purpose to include employees in the class of persons to be protected thereunder.

Fineberg, supra (slip op. at 4).

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12. The Commission held that the OSHA standard at 29 CFR § 1910.178(k)(1) was pre-empted by the Motor Carrier Safety Regulations at 49 CFR §392.20.

13. This case involved alleged unsanitary conditions in change rooms, toilets, and waste room facilities in contravention of the OSHA standard at 29 CFR § 1910.141(a).

The "policy or purpose" test expressed in *Fineberg* was again followed in *Sigman Meat Co., Inc.*, No. 251 (May 6, 1974), another food processing case.

Finally, in *Bettendorf Terminal Co.*, No. 837 (May 10, 1974), the Commission held that an employer located 10 miles from a quarry that only unloaded, dried, stored, and delivered sand was not engaged in "milling operations" and not exempted from coverage because of the Metal and Non-Metallic Mine Safety Act, 30 U.S.C. § 721 *et seq.* Thus, the Commission declined to extend an exemption under section 4(b)(1) to an employer who was only tangentially related to a business regulated by another safety act and who was never inspected by the Secretary of the Interior under the Mine Safety Act.

Three essential elements necessary for an exemption under section 4(b)(1) emerge from these cases. First, the policy or purpose of the other Act by virtue of which an exemption is claimed must be to assure safe and healthful working conditions for the benefit of employees. *See Fineberg, supra.* Such a finding is compelled by a reasonable reading of section 4(b)(1), the Commission's own precedent, and the legislative history of the Act.[14]

The second requirement for an exemption under section 4(b)(1) is that the other federal agency actually exercises its authority to prescribe and enforce occupational safety and health standards. "[I]f an agency fails to promulgate or enforce regulations covering specific

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14. In debate over the scope of exemption under section 4(b)(1) of the Act, Congress only referred to acts whose purpose was to assure safe and healthful working conditions for the benefit of employees. *See* Staff of Subcommittee on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 1018-20, 1037 (Comm. Print. 1971) (hereinafter cited as "*Legislative History*").

working conditions, the Act will apply to these conditions."[15] With respect to this possibility, Congressman Steiger, co-sponsor of the Act, remarked:

> While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health, but has taken no action, it is anticipated that these instances will be extremely rare. It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcement.[16]

The final requirement for an exemption under section 4(b)(1) is that the conditions covered by the OSHA standard are also covered by the regulations of the other agency. Although we held in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, the specific conditions regulated by OSHA must be included in the other regulations, or if there is a limited exclusion, the exclusion must be express and intentional.[17]

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15. *Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 8-9).

16. *Legislative History* at 997. *See also* the comments of Congressman Daniels, *Legislative History* at 1019-20.

17. The purpose of this requirement is so that the mere coverage by another agency's regulation of one item in an OSHA standard will not serve to exempt the other items covered only by OSHA.

> Clearly, section 4(b)(1) is intended to avoid a duplication in the enforcement efforts of Federal agencies, the action of which provides job safety and health protection to employees. By the same token, there is perforce an intent to have no hiatus in the protection of employees.

Mushroom Transport. Co., supra at 2.

II.

In analyzing the present case in light of the announced test, our starting point is a determination of the policy and purpose of the Federal Railway Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* Section 421 of FRSA contains the Congressional declaration of purpose.

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421.

The fact that the FRSA has a broad purpose and is not limited to providing solely for the occupational safety and health of employees is not fatal. There is nothing in the FRSA or its legislative history that suggests that reducing employee injuries is only an incidental aim of the legislation.[18]

The next factor to consider is whether the Department of Transportation (DOT) exercised its authority to prescribe and enforce job safety regulations under the FRSA. With respect to the crane safety standards, conceded by respondent to be contravened in its shop facility, the evidence is uncontroverted that DOT has neither exercised its grant of authority in this area nor is in the process of implementing such regulations. As DOT itself points out in its amicus curiae brief:

> Even though DOT has broad authority to regulate railroad safety, it does not regulate all aspects of

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18. *See 1970 U.S. Code Cong. & Adm. News* 4104-32.

> railroad safety. In general, DOT has not regulated offices and shop and repair facilities. . . .

Brief for DOT as Amicus Curiae at 6.

Inasmuch as no regulations have been promulgated by DOT, and none are in the formative stage, that would provide coverage for the working conditions in the shop facility of respondent, it must be concluded that respondent is not exempt from coverage under the Occupational Safety and Health Act. To adopt respondent's suggestion and hold that the enactment of the FRSA constitutes an industry-wide exemption would result in "wide gaps in coverage."[19] Such a consequence would be antithetical to the Act's express purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651(b). As the Fourth Circuit stated in reference to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*: "Remedial social legislation of this nature is to be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed." *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967), *cert. denied*, 389 U.S. 834 (1967).

I therefore concur with the lead opinion's finding of a violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(2), as to the specific standards in respondent's shops.

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19. This view is shared by DOT. *See* Brief for DOT as Amicus Curiae at 8.

III.

In turning to the recordkeeping issue, it is apparent that DOT has exercised its Congressional grant of authority in this area to require the filing of various accident reports.[20] Thus, the only other element to consider in exempting respondent from compliance with the recordkeeping requirements of OSHA is whether the conditions covered by OSHA regulations are covered by the FRSA regulations.

Part 225 of Title 49 of the Code of Federal Regulations contains all of the accident reporting provisions promulgated by the Federal Railroad Administration (FRA) under the Accident Reports Act, 45 U.S.C. § 40 and other statutes. The purpose of these accident reporting provisions is the disclosure of hazards in railroad transportation.[21]

Although at first glance these reporting provisions seem to duplicate the recordkeeping requirements of section 8(c)(1), 29 U.S.C. § 657(c)(1), and the regulations promulgated by the Secretary of Labor pursuant to that section of the Act, a closer look at the railroad reporting provisions indicates that vast numbers of accidents are excluded.[22]

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20. *See* 49 CFR § 225, discussed in detail *infra*.

21. 49 CFR § 225.10. The accident reporting provisions cover injuries to employees, passengers, third parties, and damage to equipment.

22. It may also be concluded that because recordkeeping requirements of OSHA are not substantive rules prescribing courses of conduct related to occupational safety and health, that these provisions are not subject to an exemption under section 4(b)(1). *See Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 9).

Subpart (b) of 49 C.F.. § 225.14 excludes from the reporting provisions any injury to an employee that does not incapacitate the employee for more than 24 hours in a 10-day period. Under OSHA however, injuries without lost workdays, must be reported if a job transfer or termination results, if medical treatment other than first aid is required, or if there is a loss of consciousness, restriction of work or motion, or the diagnosis of occupational illness.[23]

Subpart (e) of 49 CFR § 225.15 also excludes from the reporting provisions any accident that results from "horseplay." These types of injuries are includable under OSHA.

Finally, and most importantly, 49 CFR § 225.15(c) excludes from reporting any disability resulting from illness. The reporting of occupational illnesses was specifically intended by Congress to be an important part of the recordkeeping requirements of the Act.[24] Congress was well-aware of and much-concerned about the 390,000 new occurrences of occupational disease each year.[25]

Despite the much-quoted language in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, nothing that we stated in that decision should be construed as favoring exemptions under section 4(b)(1) of an entire field of occupational safety and health regulations when another agency's regulations only offer limited coverage. Such a construction clearly

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23. *See* 29 CFR § 1904.12(c). With respect to occupational illness, *see infra*.

24. *See* S. Rep. No. 91-1282, 91st Cong., 2d Sess., (October 6, 1970) at 16.

25. *Id.* at 3.

frustrates Congressional objectives and must be rejected.[26]

A close reading of the Act itself indicates that exact recordkeeping of occupational injuries and illnesses was one of the major aims of the Act. Recordkeeping procedures are specifically mentioned in sections 2(b)(12);[27] 8(c)(1), (2), and (3);[28] 19(a)(3), (4), and (5);[29] 24(a) and (b)(1) and (2).[30]

Although requiring the railroads to maintain OSHA records in addition to FRSA records would involve some duplication, this is a small price to pay for assuring that accurate records of all workplace injuries and illnesses are maintained. The recordkeeping requirements under the Act present neither an excessive burden nor a conflict with any FRSA procedures. Furthermore, Congress recognized that some duplication in compiling these records is inevitable.

Section 8(d) of the Act, 29 U.S.C. § 657(d) specifically states: "Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." Similarly, section 4(b)(3), 29 U.S.C. § 653(b)(3) reads: "The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act

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26 *Cf. Brennan v. O.S.H.R.C. & Gerosa, Inc.*, 491 F.2d 1340, 1343 (2d Cir. 1974); *Brennan v. O.S.H.R.C. & Santa Fe Trail Transport. Co.*, No. 74-1049 (10th Cir., October 23, 1974).

27. 29 U.S.C. § 651(b)(12).

28. 29 U.S.C. § 657(c)(1), (2), and (3).

29. 29 U.S.C. § 668(a)(3), (4), and (5).

30. 29 U.S.C. § 673(a), (b)(1) and (2).

and other Federal laws." With respect to this problem, the Senate Committee on Labor and Public Welfare stated the following:

> The committee recognizes the need to assure employers that they will not be subject to unnecessary or duplicative record-keeping requests and has specifically stated this intent in section 8(d). To that end the committee intends that, wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one Governmental agency and that other Governmental agencies, if any, should then acquire their information from the original agency.[31]

It should be apparent that the long-range answer to the problem of duplication lies in inter-agency cooperation. Indeed, this was suggested by DOT in its brief.[32] In the meantime, however, the health and safety of all workers and the express purposes of the Act dictate that the railroad industry must comply with the recordkeeping requirements of the Occupational Safety and Health Act.

For these reasons I dissent from that portion of the lead opinion that would exclude respondent from its record-keeping responsibilities under the Act.

MORAN, Chairman, Concurring in Part, Dissenting in Part:

The problem presented in this case would be nonexistent if Congress had not enacted more than one statute which regulated working conditions of employees. Nor would it have been present if Congress had provided in the Occu-

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31. *S. Rep.* No. 91-1282, 91st Cong., 2d Sess., (October 6, 1974) at 17.

32. *See* Brief for DOT as Amicus Curiae at 12.

pational Safety and Health Act of 1970 that this Act would regulate job safety and health conditions of all employees.

We are confronted with a jurisdictional question simply because Congress, over the span of many years, enacted a number of statutes which included provision for regulatory authority in order to improve safety conditions. Then, with full knowledge that it had done so, and having no intention to repeal or modify any of them, the Congress enacted the 1970 Job Safety Law and made it clear therein that its provisions would *not* apply

> ". . . TO WORKING CONDITIONS OF EMPLOYEES WITH RESPECT TO WHICH OTHER FEDERAL AGENCIES . . . EXERCISE STATUTORY AUTHORITY TO PRESCRIBE OR ENFORCE STANDARDS OR REGULATIONS AFFECTING OCCUPATIONAL SAFETY OR HEALTH."[33]

Primacy was given to the existing laws. The Job Safety Act's coverage was specifically subordinated to the others.

The expansive wording of § 653(b)(1) is a further indication that Congress intended no contraction of the coverage of the existing laws. If the other Federal agency exercises authority to "prescribe *or* enforce," Congress said, then this Act does not apply. The prescribing or enforcing authority is for either "standards *or* regulations" which may be "affecting" job "safety *or* health."

Had Congress intended the result the Commission is imposing today, it would have provided that this Act would apply to all employees

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33. 29 U.S.C. § 653(b)(1).

EXCEPT WHERE ANOTHER FEDERAL AGENCY EXERCISES ITS STATUTORY AUTHORITY TO ENFORCE OCCUPATIONAL SAFETY AND HEALTH REGULATIONS.

We are told in the lead opinion that the congressional policy of assuring safe workplaces for all "can only be effectuated by interpreting . . . [the Job Safety Act] to include rather than exclude working conditions of employees."

This pronouncement should come as a surprise to those who believed that the Atomic Energy Commission was best qualified to protect employees from radiation dangers or that the Department of Interior had similar know-how for use in protecting coal miners or the Federal Aviation Administration was well-equipped to protect the crew of commercial airliners from the hazards connected with plane crashes. Unfortunately, employees engaged in such endeavors and who have benefited from the potection of AEC, Interior and the FAA for many years are not told exactly why the congressional purpose of assuring their safety "can *only* be effectuated" (emphasis supplied) by now substituting the Secretary of Labor for the agencies with particular expertise in the very specialized employments in which they work.

It is clear to me that Congress, in its wisdom, has exercised its legislative policy-making authority to create certain agencies of the executive branch for the purpose of regulating certain broad areas of our economy. This includes the three agencies used as an example in the preceding paragraph as well as the Federal Railroad Administration.

Can you separate responsibility for the safety of a train roaring down the track from that of the crew operating

that train? Is it sensible to create an agency (the Federal Railroad Administration) and staff it with railroad experts in order to assure the public safety of those who use the trains but to then rule that responsibility for the safety of the employees of those railroads will be given over to an agency (the Department of Labor) which has no railroad experience at all?

Because I believe it is both senseless and contrary to law to so hold, I dissent from the Commission's decision holding this respondent liable for violating the Occupational Safety and Health Act of 1970. For the same reasons I concur with the view taken in the lead opinion on the recordkeeping charge.

The Commission, with this decision, has adopted a nook-and-cranny theory of safety regulation, i.e., if any Federal agency has not issued a regulation covering the configuration of toilet seats which are provided for employee use, for example, then the Department of Labor job safety standard on that subject will apply.[34] I do not believe that Congress intended a result that could lead to such absurdities. Congress recognized the railroad industry as a distinct segment of the economy and gave all regulatory power over that industry to the Department of Transportation and its Federal Railroad Administration.

The legislative history brings this out rather clearly. During the debates which preceded the passage of the Act, the following colloquy occurred in the House:

> MR. HATHAWAY. I call to mind the coal mine safety bill which is not repealed by this bill. Yet, the rules and regulations under this act, as provided in the committee bill, could and should and would get

34. 29 C.F.R. § 1910.141(c)(3)(ii).

into the area of coal mine health and safety and the metallic and nonmetallic mine safety act and the health and safety act—all three of these would continue to exist and there would be no reason why the health and safety rules promulgated under this act would not also apply to those industries.

MR. PERKINS. I would say to my distinguished colleague that he is incorrect in that statement because *all these various legislative acts as railway safety and mine safety are specifically exempted under section 22(b).* (emphasis supplied)

MR. ERLENBORN. I stand corrected. . . . Is it your understanding that present Federal laws providing authority to the executive agency to prescribe health and safety standards that are being exercised will then exempt that *industry* from the coverage of this act? (emphasis supplied). . . .

MR. ERLENBORN. In other words, the mere existence of statutory authority does not exempt an industry? It is the exercise of that authority pursuant to the statute that does exempt it; is that correct?

MR. DANIELS of New Jersey. That is correct.

MR. ERLENBORN. I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised.

Let me ask this question.

If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; does that then at the time it is exercised *exempt an industry?* (emphasis supplied)

MR. DANIELS of New Jersey. At the time that that authority is exercised, *that industry will be exempt.* (emphasis supplied)

> MR. ERLENBORN. So this does have a prospective effect. In other words, we are not going to interpret this language only as thought [sic] it were being interpreted as to conditions that exist on the day it becomes law, but it will have a prospective effect and the future exercise of authority will then *exempt an industry* from coverage under this law? (emphasis supplied)
>
> MR. DANIELS of New Jersey. *The gentleman is absolutely correct.* (emphasis supplied)
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> 116 CONG. REC. 38381 (November 23, 1970); *Legislative History of the Occupational Safety and Health Act of 1970* (hereinafter *Legislative History*), Subcommittee on Labor, Committee on Labor & Public Welfare, United States Senate, 92nd Congress, 1st session, p. 1019-1020.

Not only do these members of Congress refer again and again to an "industry" exemption, Congressman Perkins, Chairman of the Committee which reported the occupational safety and health bill to the House floor, answers unequivocably that the "rules and regulations under this Act" will not affect existing legislation. In the same answer he declares that "railroad safety" specifically is exempted by Section 22(b) [of H.R. 16785]. Section 22 (b), changed only slightly in wording, not meaning, became § 653(b)(1).

The Federal Railroad Safety Act grants the Department of Transportation authority to prescribe "as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . 45 U.S.C. § 431(a).

The authority to prescribe regulations "as necessary" would be meaningless if this Commission's nook-and-cranny theory applies, for the Secretary of Transportation

is thereby deprived of the authority to determine that it is *not* necessary for railroad safety to regulate the configuration of toilet seats, for example. The power to regulate "as necessary" must include the authority to issue no regulations in such areas. To follow this Commission's reasoning to its logical conclusion would require a ruling that if the Secretary of Transportation did not deem such requirements necessary in the interests of railroad safety and the Secretary of Labor did think them necessary for employee safety, then the latter's judgment would prevail over the former's. Surely, if the Congress had intended such an unusual provision it would have been explicit in so stating.

Nevertheless, rather than consider the concrete evidence of congressional intent which the legislative history provides, the Commission finds that § 653(b)(1) must be narrowly interpreted in order to further the purposes of the Act.[35] Such reasoning presumes that Congress felt the Department of Labor alone was competent and could be trusted to effectively promote occupational safety and health. I find such reasoning arrogant and patently unjustifiable. Congress has consistently entrusted the Department of Transportation (and its predecessors) with full jurisdiction over the railroads. There is nothing in the legislative history which would supply any reason why Congress would take jurisdiction from one agency with long-standing expertise in a particular industry and give

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35. I do not see that the Department of Transportation's support of the Secretary of Labor's interpretation of § 653(b)(1) is relevant. Jurisdiction of agencies is defined by statute, not by agreement between them. It is therefore our duty to resolve the question on the basis of what was legislated by Congress, not by what two departments *wish* Congress had done and what arrangement might be more covenient for their own interests.

it to another, with none. Indeed, that history is exactly to the contrary.

It is my opinion that Congress envisioned a comprehensive program for employee safety under which the Department of Labor would have jurisdiction over those industries not under the regulatory authority of some other Federal agency. In furtherance of this purpose Congress enacted the Federal Railroad Safety Act on October 16, 1970. On October 30, 1970, it adopted the Rail Passenger Service Act and, less than 2 months thereafter, it adopted the Occupational Safety and Health Act of 1970. It was signed into law on December 29, 1970. Certainly Congress was aware of the interrelationships created by these statutes and intended them to work as a whole. To justify a broad interpretation of § 653(b)(1) because the Act is "humanitarian" or "remedial" implies that it is "more humanitarian" or "more remedial" than the other acts.[36]

In passing the laws referred to above (as well as others not referred to in this opinion), Congress enacted specific legislation for railroad safety (and for airplane safety, coal mine safety, nuclear energy safety, etc.) It intended to treat railroad safety differently and by including § 653 (b)(1) as part of the Job Safety Act it exempted that

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36. Query whether a law intended to achieve public safety is more or less "humanitarian" or "remedial" than one designed to accomplish worker safety. The attempt to apply such a rule of construction in this situation is not only meaningless because of this problem but because § 653(b)(1) is not an "exemption" or "exception" of persons covered by other acts. As indicated at an earlier point in this opinion, the coverage of the other acts is given primacy and the coverage under the Job Safety Act is subordinated thereto.

Act's coverage from the railroad safety arrangement it had already created.

The lead opinion makes reference to the provision of the Rail Passenger Service Act which excluded the application of certain Department of Labor safety standards to railroad employees,[37] but it ignored the significance of the inclusion of that exclusion. Respondent raised this reference in its argument on this case, not because it thought that the exclusion had any applicability here, but because it is further evidence of congressional intent. The reason Congress excluded railroad employees was because Congress had confidence in the Department of Transportation, and knew that all railroad safety was already under the jurisdiction of that Department and it wanted to be sure it remained there.

A further demonstration of congressional intent to leave all aspects of railroad safety under the jurisdiction of the Department of Transportation was included in the Conference Report on the Amtrak Improvement Act of 1973, 45 U.S.C. § 502, wherein it was stated that:

> The Federal Railroad Safety Act of 1970, enacted only two weeks prior to the Rail Passenger Service Act, defined the Secretary of Transportation's jurisdiction over railroad safety to include "all areas of railroad safety." It is the intent of the Committee of conference to make clear that *the Secretary's jurisdiction over railroad safety is exclusive.* 93rd Congress, 1st Session, H.R. Report No. 93-587.

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37. It should be noted that there was a work safety law applicable to the consruction industry which was administered by the Department of Labor and which pre-dated the enactment of the Job Safety Act. *See* 40 U.S.C. § 333. The exclusion in the Rail Passenger Act was from that law.

Perhaps the most troublesome matter in this case results from the sheer volume of occupational safety and health standards which have been promulgated by the Secretary of Labor pursuant to the authority given him in the Job Safety Act. It is estimated that it would take 1,400 typewritten pages to copy them, plus an additional 2,000 pages to type out all the regulations which apply but were not printed in the Federal Register because of an incorporation-by-reference referral to other documents. The regulations cover every conceivable aspect of human endeavor including the configuration of toilet seats,[38] the disposal of used hand towels,[39] the placement of fire extinguishers,[40] the amount of noise[41] and toxic chemicals to which an employee may be exposed,[42] and the color of fire exit signs.[43] Perhaps, in anticipation of the outcome of this case the regulations even specify what must be done during the loading and unloading of railroad cars.[44]

To read all the regulations would take days. To understand their full meaning and applicability is probably an impossible task even if one takes the time to read all the decisions of this Commission (which now cover more than 10 volumes of published material). Of course, no employer covered by this law needed to do all of this prior to the issuance of this decision. He could locate those

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38. 29 C.F.R. § 1910.141(c)(3)(ii).

39. 29 C.F.R. § 1910.141(d)(3).

40. 29 C.F.R. § 1910.157.

41. 29 C.F.R. § 1910.95.

42. 29 C.F.R. § 1910.93.

43. 29 C.F.R. § 1910.144(a)(1)(i)(d).

44. 29 C.F.R. § 1910.178(k)(2).

matters applicable to his particular business or industry through an index to the regulations and would not have to concern himself with the others.

However, because of the nook-and-cranny theory which is announced in this decision employers in the railroad industry must become familiar with all Department of Transportation railroad safety regulations, then they must figure out what has *not* been covered thereby. They must then look to the Labor Department's occupational safety and health standards to discover how these gaps in the railroad safety regulations are filled. Because of the flexible and obscure language employed in some such standards,[45] few such employers will be able to ascertain the applicability of the various regulations with any preciseness.

Difficulties of this kind will also affect the various inspectors and others who are responsible for seeing that the safety requirements are observed. Under such circumstances it is very unlikely that the intended purpose of the Job Safety Act can be fully realized or the intended beneficiaries of the law fully protected.

The concept of "working conditions" is elusive. Complainant takes the position that it refers to any specific hazard to workers. A reasonable application of that term, therefore, would include anything that could be classified as hazardous. It is difficult to think of anything that could not—at some time or other—be so classified whether it be an employee's hours of work, state of mind, age, or his personal feelings about how his employer and fellow employees treated him.

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45. See, for example, 29 U.S.C. § 1910.242(a) and 29 U.S.C. § 1910.132(a).

I mentioned the foregoing merely to indicate the pandora's box which the Commission has opened today. The decision also leads one to the inescapable conclusion that —in the opinion of two members of this Commission— Congress had no sense of order and intended to create confusion of the sort described. I don't share such a view. I am of the opinion that Congress intended to create a workable system to improve occupational safety and health and that they were wise enough to leave all aspects of safety in the railroad industry in the hands of the railroad experts in the Department of Transportation.[46]

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46. A clear indication that Congress intended no changes in the existing laws by its adoption of the Job Safety Act comes from the remarks of Senator Williams, the Act's principal Senate sponsor. During debate on November 16, 1970, just prior to a favorable Senate vote on the bill which was enacted, he stated:

> "There has been no description here that I have heard of the failure of any of these programs, whether it is construction safety, railway safety, or coal mine safety."

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Petitioner,

v.

W. J. USERY, Jr., Secretary of Labor, and Occupational Safety and Health Review Commissions, Respondents,

and

United Transportation Union and American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), Intervenors.

UNION PACIFIC RAILROAD COMPANY, Petitioner,

v.

W. J. USERY, Jr., Secretary of Labor, and Occupational Safety and Health Review Commission, Respondents,

and

United Transportation Union and American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), Intervenors.

SEABOARD COAST LINE RAILROAD COMPANY, Petitioner,

v.

W. J. USERY, Jr., Secretary of Labor, and Occupational Safety and Health Review Commission, Respondents.

and

United Transportation Union and American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), Intervenors.

Nos. 74-3981, 75-1613, 74-3984.

UNITED STATES COURT OF APPEALS,

Fifth Circuit.

September 22, 1976.

Consolidated cases involved the question whether railroads were obliged to comply with safety standards promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act. The Court of Appeals, Gee, Circuit Judge, on petitions for review of orders of the Occupational Safety and Health Review Commission, held that OSHA coverage is displaced by an "exercise" of Department of Transportation authority only for the "working condition" embraced by that exercise.

Petitions denied.

* * *

Petitions for Review of Orders of the Occupational Safety & Health Review Commission (Texas and Georgia cases).

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

GEE, Circuit Judge:

These consolidated cases involve a single question of statutory interpretation: whether the petitioners, at the time the violations involved here occurred, were obliged to comply with safety standards promulgated by the Secretary of Labor (the Secretary) pursuant to the Occupational Safety and Health Act (OSHA), 29 U.S.C.

§ 651 et seq. (1970). In No. 74-3981, Southern Pacific Transportation Co. petitions for review of an order of the Occupational Safety and Health Review Commission (OSHRC) finding that it committed four nonserious violations of 29 U.S.C. § 654(a)(2) in connection with the June 1972 operation of a diesel service shop in Houston, Texas. In No. 75-1613, transferred to this court by the Eighth Circuit, Union Pacific Railroad Co. petitions for review of a similar order adjudicating three violations of the same statute occurring in September 1972 in Union Pacific's train dispatching center in a yard office in Pocatello, Idaho. In No. 74-3984, Seaboard Coast Line Railroad Co. seeks review of an OSHRC order reversing the decision of its Administrative Law Judge (ALJ) that Seaboard could not be penalized for a nonserious statutory violation allegedly discovered during a March 1973 inspection of Seaboard's rail repair shop in Savannah, Georgia.[1] Because each petition presents for review the same and sole legal issue,[2] and except as specifically noted, we hereafter treat the petitioners as a single entity (the railroads).

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1. Alleging that the order remanding the case to the ALJ is not a reviewable order under 29 U.S.C. § 660(a), the Secretary moved to dismiss Seaboard's petition. During the pendency of the petition, the ALJ made a finding that a violation occurred, and OSHRC has granted review. Because a finding that we lack appellate jurisdiction would produce the same result—the continuation of OSHRC's review—as our decision on the merits, and because the merits of the petition are already before us in the other two cases, we need not and do not reach the jurisdictional question posed by the Secretary's motion. *See United States v. Augenblick*, 393 U.S. 348, 349-52, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); *Slocum v. United States*, 515 F.2d 237, 238 n. 2 (5th Cir. 1975); *cf. Norton v. Mathews*, ____ U.S.____, ____, 96 S.Ct. 2771, 49 L.Ed.2d____ (1976).

2. Southern Pacific and Union Pacific conceded that the cited noncompliances existed; Seaboard denied the violation, but this factual issue is not before us now.

These cases turn on the meaning of section 4(b)(1) OSHA, 29 U.S.C. § 653(b)(1), which provides in Delphic terms:

> Nothing in this chapter [which encompasses the complete text of OSHA] shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The railroads' position is that this section means that *any* "exercise," be it never so partial, by the Department of Transportation (DOT), acting through the Federal Railroad Administration (FRA), of its statutory authority to regulate railroad safety exempts the railroad industry from OSHA regulations to the full extent of DOT's potential regulatory authority.[3] This position, termed the "industry-wide" exemption theory, has been squarely rejected in *Southern Ry. v. OSHRC*, No. 75-1055, ____ F.2d____ (4th Cir., 1976). Although our analysis follows

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3. The most comprehensive source of the FRA's authority to regulate railroad safety is the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* (1970). Intervenors United Transportation Union and the AFL-CIO argue that this statute does not empower the FRA to regulate the working conditions involved in these cases either because they are not peculiar to rail transportation or because they raise health, as opposed to safety, issues. We intimate no view on the merits of these arguments. We must decide the railroads' claim of an industry-wide exemption regardless of the precise scope of FRA authority. Our conclusion that existing FRA activity does not displace OSHA coverage in these cases makes it unnecessary to consider whether any of that activity is outside the FRA's statutory authority. And it is obviously unnecessary to decide whether the FRA's authority would permit it to regulate these working conditions so as to oust OSHA in the future.

a slightly different track, we agree with the Fourth Circuit's result and reject the railroads' argument.

The railroads and the Secretary agree that the exemption provided by section 4(b)(1) is not activated by mere existence in the FRA of statutory authority to regulate railroad safety; some "exercise" of that authority is necessary to oust OSHA's pervasive regulatory scheme. Thus, the statute generates an anomalous relationship between the Secretary and agencies such as the FRA, decreeing the existence of overlapping authority to regulate railroad safety, with displacement of OSHA coverage by the FRA dependent on unilateral action by the FRA rather than on either a determination by some neutral agency or on consultation between the Secretary and the FRA. All parties likewise agree that the only exercises of FRA authority before the dates on which the cited violations occurred were promulgation of regulations for specific items of railroad operating equipment and development of an accident-reporting and record-keeping system. Although the issue of statutory interpretation must be addressed in broader terms, the first specific question in these cases is therefore whether these acts are a sufficient "exercise" to activate section 4(b)(1) and thus preempt OSHA coverage of other aspects of railroad employees' safety.[4] We conclude that they are not.

[1] The railroads suggest that the phrase "working conditions of employees" in section 4(b)(1) is equivalent to "industries." Building on a comparison between section 4(b)(1) and 29 U.S.C. § 673(a), which exempts "employments excluded by section 4]" from OSHA's statisti-

4. We are not asked to review OSHRC's conclusion that the FRA's recording requirements activate section 4(b)(1) to displace OSHA record-keeping regulations.

cal provisions, they argue that "employments" is equivalent to "industries" and that section 4(b)(1) therefore creates an industry-wide exemption. The effect of this argument is first to magnify a minimal ambiguity and then to resolve it by reference to a more ambiguous provision.[5] We think the term "working conditions" plainly refers to something more limited than every aspect of an entire industry. The term has a technical meaning in the language of industrial relations; it encompasses both a worker's "surroundings" and the "hazards" incident to his work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). And while we must concede that the reference to section 4 in 29 U.S.C. § 673(a) is confusing, we do not agree that this reference gives the phrase "working conditions" a meaning which never appears elsewhere in OSHA—that of "industries." Indeed, other sections of OSHA imply that the term "working conditions" has a narrow scope. *See e.g.*, 29 U.S.C. § 670(c)(1).

[2] The structure of section 4(b)(1), particularly its cross-reference to 42 U.S.C. § 2021 (1970), reinforces our conclusion that the FRA's pre-1975 regulatory activity did not displace the general OSHA regulatory scheme. Section 2021 deals with state regulation of the atomic

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5. Although this case does not require a definitive interpretation of 29 U.S.C. § 673(a), we note that the legislative history offers substantial support for the Secretary's position, rejected by OSHRC, that "employments" refers only to the geographic exemptions of section 4(a), 29 U.S.C. § 653(a). *Compare* S. 2193, 91st Cong., 2d Sess., § 21(b), *reproduced* in Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Health and Safety Act of 1970, 585 (Comm. Print 1971) (hereinafter cited as Leg. Hist.) (final version of Senate bill) *with* Leg. Hist. 1120 & 1135 (final version of House bill—source of 29 U.S.C. § 673(a)).

energy industry. It provides a detailed system in which regulation for some purposes is explicitly left to the states, regulation of certain activities is reserved to the Atomic Energy Commission, and regulatory authority over certain materials is entrusted to the federal government subject to federal-state agreements to transfer this authority to a state. Such an arrangement is the antithesis of an industry-wide exemption. We think it most unlikely that section 4(b)(1) was intended to establish industry-wide exemptions for industries otherwise regulated by the federal government when the scope of its exemption for state regulation is so meticulously limited to specific topics.

[3] We also find support for our conclusion in the legislative history of OSHA. The railroads offer a colloquy on the House floor as the definitive legislative history of section 4(b)(1).[6] However, this colloquy dealt with a version of the House bill, a version that differed from the final text of section 4(b)(1) in that it exempted "working conditions of employees with respect to *whom* other Federal agencies . . . exercise statutory authority . . . ." *See, e. g.*, Leg.Hist., *supra* n. 5, at 1135 (emphasis added). The Senate proceedings clearly demonstrate that the Senate language was not intended to create an industry-wide exemption.[7] The conference com-

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6. This colloquy, the so-called Erlenborn-Daniels colloquy, is found at 116 Cong. Rec. 38,381-82 (Mar. 23, 1970), *reproduced in* Leg. Hist., *supra* n. 5 at 1018-21.

7. S. Rep. No. 1282, 91st Cong., 2d Sess. (1970), *reproduced in* Leg. Hist. *supra* n. 5, at 141, states:

> The bill does not authorize the Secretary of Labor to assert authority under this bill over *particular working conditions* regarding *which* another Federal agency exercises statutory authority to prescribe or enforce standards affecting occupational safety and health. (emphasis added)

Id. at 22, Leg. Hist. at 162; U.S. Code Cong. & Admin. News 1970, p. 5199.

mittee recognized the difference in language and consciously chose the Senate version.[8] Since the legislative process—the process by which Congress arrived at the statutory language—is often a better guide than the interpretations of individual legislators or committee reports, *see Corning Glass Works v. Brennan*, 417 U.S. 188, 198, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974), we attach some weight to the substitution of the Senate version for that passed by the House. And although the Senate's language remains less than pellucid, the conscious and deliberate substitution of that language for the House version tending more clearly toward an industry-wide exemption strongly suggests that the statute as passed contemplates a narrower kind of exemption. *Cf. American Smelting & Refining Co. v. OSHRC*, 501 F.2d 504, 508-13 (8th Cir. 1974).[9]

Finally, the purpose of OSHA, announced in particularly expansive terms, is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ." 29 U.S.C. § 651(b). If this be the goal, it seems unlikely that Congress would wish the ubiquitous OSHA regulations in question here to be displaced by the FRA's limited operating-equipment and accident-

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8. *See* Leg. Hist., *supra* n. 5, at 1185-86 (Statement of the Managers on the Part of the House). Indeed, the leader of the House representatives on the conference committee remarked in introducing the conference bill to the House that, "[t]here was a major difference in the two bills in the treatment of the proposed effect on other preexisting health and safety statutes" 116 Cong. Rec. 42,201 (Dec. 17, 1970) (remarks of Cong. Perkins), *reproduced in* Leg. Hist., *supra* n. 5, at 1204.

9. We give regard to the legislative process as a whole rather than merely to the simple grammatical change from "whom" to "which."

reporting activity. Placed in this context, the railroads' interpretation of section 4(b)(1) as an industry-wide exemption becomes an assertion that a requirement of accident reporting displaces substantive standards designed to prevent accidents—an assertion inconsistent with such an announced statutory purpose.

[4-6] Our rejection of the railroad's position does not constitute an acceptance of the theory that every OSHA regulation remains operative until the FRA adopts a regulation of its own on that specific subject. As we have noted, the statutory term "working conditions" embraces both "surroundings," such as the general problem of the use of toxic liquids, and physical "hazards," which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace). Neither OSHA itself nor the existence of OSHA regulations affects the ability of the primary regulatory agency, here the FRA, to articulate its regulations as it chooses. Much of their displacing effect will turn on that articulation. Section 4(b)(1) means that any FRA exercise directed at a working condition—defined either in terms of a "surrounding" or a "hazard"—displaces OSHA coverage of that working condition. Thus, comprehensive FRA treatment of the general problem of railroad fire protection will displace all OSHA regulations on fire protection, even if the FRA activity does not encompass every detail of the OSHA fire protection standards, but FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm signaling systems.[10] Furthermore, as the dominant agency in its lim-

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10. In *Southern Ry. v. OSHRC*, No. 75-1055, ____F.2d____ (4th Cir., 1976), the court likewise interpreted section 4(b)(1) in a manner which avoided the extreme positions of the Secretary and

ited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations—and no others—should apply to a defined subject.

[7] We recognize that a regulatory exercise expressed in terms of a category of equipment or a generalized problem may raise questions about whether a given item is covered. Conversely, an exercise expressed in terms of piece of equipment may create an issue about whether the FRA has regulated the entire category to which that piece belongs. In either situation, the scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations.

[8] We are sympathetic to the railroads' argument that regulatory duplication is undesirable because it makes it excessively difficult for the employer to know which standards he is required to obey and may create undue expense from successive compliance with different standards. But we think it clear that avoiding duplication was a secondary purpose of the OSHA/FRA scheme. OSHA was drafted in recognition of the possibility, since realized, that the FRA would fail to implement its authority before some OSHA regulations became effective. These unfortuate consequences, inherent in the nature of the beast, may be avoided or greatly minimized by a clear statement, in each instance of displacing regulation, of the FRA's

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the railroads. The Fourth Circuit defined "working conditions" as "the environmental area in which an employee customarily goes about his daily tasks." *Id.* at _____. Our conclusion that the operative effect of section 4(b)(1) is determined by the manner in which the FRA articulates its exercise of authority seems to us more attuned to the differing possible meanings of the term "working conditions" as it is used elsewhere in the field of industry relations.

position on these preexisting OSHA regulations which it seeks to oust.

[9] Finally, the railroads contend that the FRA's March 1975 "Advance Notice of Proposed Rule-Making," inviting pre-proposal comment on numerous substantive regulations,[11] combines with preexisting FRA activity to constitute the requisite "exercise" of the FRA's statutory authority. The FRA's 1975 activities are irrelevant to the Union Pacific and Southern Pacific petitions. The violations involved in these two cases, and final administrative decisions on them, occurred before 1975, and the Secretary does not now seek to enforce OSHRC's orders. The March 1975 action may be relevant, however, to Seaboard's petition, and we therefore consider its impact. We agree with the Fourth Circuit's view in *Southern Ry., supra,* that this speculative announcement adds nothing to previous FRA activity and is not a sufficiently concrete "exercise" to preempt the otherwise applicable regulations. Section 4(b)(1) requires an actual "exercise" of "authority to prescribe or enforce standards or regulations," and this bare announcement that the FRA is considering promulgation of regulations does not suffice, either alone or in combination with previous activity.[12] The railroads rely on the remarks of the House bill's sponsor that preemption would occur when other agencies were in "the

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11. *See* 40 Fed. Reg. 10,693 (1975). This notice requests comments on enumerated, existing OSHA regulations, including some of those relevant to railroad shops and offices.

12. 121 Cong. Rec. 21,261 (daily ed., Dec. 5, 1975) (remarks of Sen. Williams, author of the Senate version of OSHA). *Contra, Dunlop v. Burlington Northern R. R.,* 395 F.Supp. 203 (D. Mont. 1975). The "Advance Notice" is merely a preliminary to a formal "Notice of Proposed Rulemaking." *Compare* 40 Fed. Reg. 10,693 (1975) *with* 39 Fed. Reg. 25,959 (1974).

formative stages of regulations or enforcement." 116 Cong. Rec. 38,373 (Nov. 23, 1970) (remarks of Cong. Steiger), *reproduced in* Leg. Hist., *supra* n. 5, at 997. These remarks, whatever they indicate about the intent of the whole Congress, do not convince us that Congress meant for section 4(b)(1) to be activated in the present circumstances by mere announcements of possible regulatory action. Congress obviously wanted railroad health and safety conditions to be regulated forthwith by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage. It seems unlikely that this same Congress could have meant for *existing and operative OSHA regulations* to be displaced without more conclusive FRA action than a mere statement of intent to do something in the future. Acceptance of the railroads' theory would produce an especially ludicrous result in the *Seaboard* case; the FRA's still-inoperative proposal to adopt a ventilation regulation would abort OSHRC's effort to induce compliance with an identical OSHA regulation.[13]

We have carefully considered the other maxims of statutory construction and aids to statutory interpretation marshalled by the parties, particularly the interaction between OSHA and the Federal Railroad Safety Act, 45

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13. *See* 40 Fed. Reg. 10,693, 10,694 (1975). We would confront a different question, one on which the railroads' legislative history might be more persuasive, if the FRA "exercise" were already in a "formative stage" when an OSHA regulation on the same working condition became effective. Thus, our conclusion intimates no view on whether any OSHA regulations newly effective after March 1975 on topics covered in the "Advance Notice" apply to the railroad industry. In the same vein, we need not and do not consider the Secretary's position that only action which creates a regulatory "standard" within the meaning of 29 U.S.C. § 652(8) is an "exercise" triggering section 4(b)(1).

U.S.C. § 421 *et seq.* (1970), the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.* (1970), the Amtrak Improvement Act, 45 U.S.C. § 502 (Supp. 1973), and the Rail Safety Improvement Act, 45 U.S.C. § 440 (Supp. 1974). We find these additional considerations insufficiently persuasive on either side of the questions before us to require further discussion.

To summarize our view of section 4(b)(1), OSHA coverage is displaced by an "exercise" of DOT authority only for the "working condition" embraced by that exercise. Since DOT has not yet exercised its authority on the working conditions which are the subject of these OSHRC orders, the petitions for review are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-3981

Your No. OSHRC 1348

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, and SECRETARY OF LABOR,
Respondents.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Texas Case)

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Southern Pacific Transportation Company for review of an order of the Occupational Safety and Health Review Commission, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health

Review Commission in this cause be, and the same is hereby denied;

It is further ordered that petitioner pay to respondents the costs on appeal to be taxed by the Clerk of this Court.

September 22, 1976

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3981

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

W. J. USERY, JR., Secretary of Labor, and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

On Petitions for Review of Orders of the
Occupational Safety & Health Review Commission
(Texas and Georgia cases)

ON PETITION FOR REHEARING

(January 10, 1977)

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GEE
United States Circuit Judge

Form 703-2